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ABSTRACT

The book examines actions that may be taken to redress wrongs illegally perpetrated against people with intellectual disabilities in New South Wales, Australia. Ten topic areas are addressed (sample subtopics in parentheses): protecting rights (complaints to government departments, use of the ombudsman); discrimination (legal aid); personal relationships (marriage, having children, adoption); sheltered workshops (legislation, work contracts, discrimination and harassment); housing (controls over residential facilities); guardianship and money management for adults (informal and formal money management); wills (trustees, income tax, wills for intellectually disabled people); crime and the intellectually disabled (defenses, police, confessions); consumer protection (unfair contracts, legal effect of incapacity); and care givers (physical interference, negligence). (CL)

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LEGAL RIGHTS & INTELLECTUAL DISABILITY

a short guide

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Redfern Legal Centre
Intellectual Disability Rights Service

EC-000532

Wills, Workshops, Discrimination *and much more*

LEGAL RIGHTS
&
INTELLECTUAL DISABILITY
a short guide

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Rights Service

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INTRODUCTION — Is there any justice for intellectually disabled people?

People with intellectual disabilities often have their rights violated. They are often physically mistreated, discriminated against and financially exploited. Their rights to make their own choices in life are often ignored.

Violations of these rights very often go unrecognised. When the violation is recognised, seldom is it remedied.

There are a number of barriers to justice which give rise to this situation. Some of these barriers can always be overcome. None of these barriers can never be overcome.

Disabled people often don't realise they have been wronged or know what to do about it.

Many disabled people can be educated about these things. Also, relatives, citizen advocates and caregivers can watch out for disabled people and take action for them.

Disabled people might not be believed in court.

If disabled people do not contradict themselves, they may be *more* likely to be believed than non-disabled people. Most cases are 'settled out of court'. Also, a court case is seldom the best way to solve a problem. For example, you can negotiate or you may be able to complain to the Ombudsman.

If a case is pursued, the disabled person may suffer, for example, by being sacked from a workshop.

This sort of fear is often groundless. For example, in a recent case, parents complained to the Ombudsman about the treatment of their son when he was in respite care. The son stayed at the same institution many more times and received excellent treatment.

Lawyers often don't know about intellectual disability and the relevant law.

An increasing number of lawyers do know about these things. Books have been written for lawyers. Also, Redfern Legal Centre and Macquarie Legal Centre in Sydney have specialised intellectual disability services. They can provide advice and referral and will sometimes carry a case right through. They will advise other lawyers.

INTRODUCTION (continued)

The law itself sometimes does not adequately deal with the problems of intellectually disabled people.

The law often is adequate and is gradually being improved. Intellectually disabled people no longer come under the Mental Health Act. The Protected Estates Act provides a much improved method of looking after the money of disabled people who cannot look after their own money.

Far too often people see a problem but don't think it is their responsibility to take action. If disabled people are to obtain justice, it is essential that this attitude changes. Disabled people often need 'advocates'. It is necessary that relatives, friends and caregivers see that they can help by doing this.

Very often, people see a problem but think that there is nothing that can be done about it. They have often spent many years fighting to obtain adequate services for their disabled son or daughter. They have often had little success in this fight and so do not think they can do anything when they see a disabled person being wronged.

This book spells out what **can** be done when a disabled person is wronged. Usually, there **is** something that can be done. At the very least, it is worth ringing a place like the Intellectual Disability Rights Service at Redfern Legal Centre to check.

This book also deals with ways of protecting disabled people through guardianship and money management. Finally, it discusses how best to provide for an intellectually disabled person in a will.

The book deals specifically with the law in N.S.W. However, it will still be useful to readers in other parts of the country.

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PROTECTING YOUR RIGHTS

There may be better ways than going to court to achieve your aim or to solve a problem. Some suggestions are listed below.

Even if there is a legal remedy, going to court is not necessarily the best course of action. It can encourage people to oppose each other rather than to talk and it can be costly and time-consuming. It should be viewed as a last resort.

Sometimes people are reluctant to take action out of fear that taking action will lead to the disabled person suffering, e.g. by being told to leave a group home. Very often there is no good reason for this fear. At the least it is worth having a confidential talk about the problem with a place like a legal centre (see **Contact Points**).

(1) See Your Local M.P.

Complaints can be taken to a local Member of Parliament or the relevant Minister. It is her or his job to follow up a complaint. When consulting a Member of Parliament it is best to:

(i) Make an appointment and see them in person;
(ii) Present a written account of complaints; and
(iii) Take someone with you for support.

Complaints and representations to Members of Parliament need to be followed up if they are to be effective. Letters of support from other people similarly affected, or from organisations such as action groups, will add weight to your complaint. If there are a number of people affected, a ***collective submission*** may be an effective way of drawing attention to the problem. Sometimes government departments have special powers to deal with particular types of complaints (see **Complain to Government Departments** below).

(2) Talk to the Media

The media can be a useful tool for drawing public attention to abuses of disabled people's rights. For example, if the conditions in a residential are very bad, a current affairs show may be interested. However, you should be careful when using the media and have particular regard to the privacy and feelings of the individual disabled person, the person's family and anyone else involved.

(3) Negotiate

Very often problems can be sorted out by talking with the people involved. In many cases, negotiation using an independent mediator

(eg. a conciliator at a Community Justice Centre) helps to resolve a dispute.

(4) Complain to Government Departments

Some government departments can help protect the rights of intellectually disabled people:

Department of Youth and Community Services

This State department has the power to license training centres (eg. workshops) and residential centres such as boarding houses for disabled people (see Chapter 4, **Sheltered Workshops** and Chapter 5, **Housing**. These facilities must comply with certain basic standards in order to obtain and keep a licence. This is an area of supervision that at present is not used as much as it might be. If you have a complaint, ring the Licensing Branch (see **Contact Points**).

Health Department of NSW

Complaints can be made to the Health Department about its own staff and about public hospitals, psychiatric hospitals, private hospitals, nursing homes and other places where intellectually disabled people live, such as boarding houses. In relation to most of these facilities the Department has the power to enter and inspect and enquire into the facilities' management and activities. What the Department can then do varies with the type of facility. The Department deals with complaints about things such as access to records, lack of availability of necessary treatment, assault of disabled residents and negligent treatment.

The Department has a special Complaints Unit (see **Contact Points**). Normally you should first try complaining to a local official or the head of the facility concerned. If, however, your complaint is major or if you don't know where to complain, go straight to the Complaints Unit. The Unit can carry out comprehensive investigations and make recommendations to the Secretary of the Department.

Department of Community Services

This Federal Department funds sheltered workshops, activity centres and many places where intellectually disabled people live. It will put pressure on organisations funded by it to change bad or outdated practices. The Department is concerned to ensure that organisations involve disabled people in decision-making and respect the rights and dignity of disabled people. For example, it would be concerned about a practice of not allowing disabled people to have visitors of the opposite sex in their bedrooms. If you have

a complaint, ring the Disability Services Section of the Department (see **Contact Points**).

(5) Contact the Ombudsman

The NSW Ombudsman

George Masterman QC is the NSW Ombudsman. His job is to investigate complaints against NSW Government Departments, local councils or other public authorities. If he thinks the public service was wrong, he will take up the case for you.

If you think that an intellectually disabled person has been treated unfairly by a Government agency, make a complaint. The Ombudsman has power to investigate almost all NSW Government Departments as well as the police, local councils and statutory bodies such as public hospitals. You can complain, for example, if you feel there is inadequate staffing in a group home run by a public hospital or if an accident in a hospital has not been properly investigated. If you are not sure whether the Ombudsman can help with your problem, telephone or go in and ask.

What will happen if you make a complaint?

The Ombudsman's first step is usually to ask the public service for its explanation of what happened. If a mistake has been made, it can often be fixed at this stage.

When he investigates complaints, the Ombudsman has wide powers. He can demand Departmental records, enter and inspect government premises, and cross-examine the public servants concerned.

If he decides that the Department was wrong, he can recommend that action be taken to fix your problem, and also to ensure that it does not happen again. He can recommend that compensation be paid. If he is not satisfied that the Department has fixed the problem, he can make a report to Parliament about it.

How do you make a complaint?

It is best to make your complaint in a letter and then bring it, or send it, to the Ombudsman's office. The Ombudsman has staff who will help you to prepare your complaint. For the address and phone number see **Contact Points**.

What can't the Ombudsman do?

The Ombudsman's job is to make sure that the public service is acting fairly, but he cannot do the Government's job for it. For example, if the State Rail Authority wants to alter the train services

to your area, George Masterman can make sure that your views have been considered properly and that the decision is based on the correct information. However, he cannot change the decision simply because he disagrees with it. In addition, the Ombudsman can receive complaints against police but he cannot investigate them at first. The initial investigation of the complaints is done by police, and the Ombudsman can then consider their report and say whether or not he agrees with it. He can then reinvestigate if he thinks it appropriate.

Don't be afraid to complain!

Everyone makes mistakes — even the public service. The Ombudsman's job is to help fix these mistakes and make the Government work better for you.

If you have a problem, don't be afraid to complain. The Ombudsman may be able to help you.

The Commonwealth Ombudsman

Geoff Kolts Q.C. is the Commonwealth Ombudsman (see **Contact Points**). He has a similar role to the NSW Ombudsman but his job relates to Commonwealth Government bodies, eg. the Department of Social Security and the Department of Community Services.

(6) Report Professional Malpractice

Some professions have their own rules of conduct and disciplinary procedures. All solicitors, for example, are subject to disciplinary control by the Law Society of NSW and doctors by the NSW Medical Board (see **Contact Points**). Complaints can be made to these bodies; if the professional behaves improperly, for example, by giving out information about his or her patient or client without that person's consent. Other complaints might be about a lawyer being very slow or a doctor overcharging.

(7) Protecting Your Privacy

Personal Information

Large amounts of personal information about intellectually disabled people are held by medical and education authorities, health professionals, employers and government departments. Sometimes, such information is given to others without the knowledge or consent of the person concerned, causing prejudice or embarrassment to her or him. The damage that such disclosure can cause is even greater where the information is out of date, misleading or incomplete.

There is no general right to privacy in Australian law but there is some protection in specific situations.

The ***Privacy Committee*** of New South Wales can often help. The Committee is a permanent body created by the Privacy Committee Act 1974. The major functions of the body are research, education, recommendations concerning privacy issues and policy, and assistance with complaints regarding privacy. The Committee can deal with complaints about invasion of privacy by government and non-government bodies, eg. where the body improperly discloses information about a person. The Committee cannot force a body to respect a person's privacy but, because of its official status, it can often persuade the body to do so.

Some government bodies (eg. the NSW Department of Health) have official policies designed to avoid improper disclosure of personal information. A complaint to a higher official may solve your problem.

Other government departments are bound by secrecy provisions contained in statutes which prevent them generally from disclosing information about individuals to outsiders. Legal action can be taken if they breach these provisions.

Some professions such as doctors have ethical rules requiring them to keep information about a client confidential. (See **(6) Report Professional Malpractice**, above).

Sometimes the terms of a contract will impose an obligation on a party not to disclose certain information. A contract is entered into almost every time you pay someone for goods, services or facilities. The contract doesn't have to be in writing. A verbal agreement is enough. This is something to consider if you are thinking of making a contract for work or to live somewhere. A doctor/patient relationship is a contract. It would probably be an 'implied term' of the contract that the doctor would not disclose personal information about the patient. This means that even though the parties did not actually discuss and agree upon the matter, a court would say that it is part of the contract because the parties would have included it had they thought about it.

The law also prohibits disclosure of information which a person should reasonably have realised was confidential, eg. if a disabled person tells a house parent 'a secret'. This is what lawyers call an 'equitable duty'.

This principle may well apply to personal information given to a professional such as a social worker, even though no-one says that the information is confidential. It is enough that the social worker should have realised it was confidential.

If you are not sure what to do about a disclosure of information ring the Privacy Committee for a confidential discussion.

Other invasions of privacy.

Disabled people's privacy is often invaded in other ways. For example, their mail might be opened by the management of their boarding house or they might not be allowed to have a member of the opposite sex come into their bedroom. There are often things that can be done in these situations. As a first step, consult the Privacy Committee or a legal centre (see **Contact Points**).

(8) Getting Access to Information

There is no law saying that people are entitled to all information held by others about them. However, very often information can be obtained through using the Commonwealth Freedom of Information Act, or by more informal means.

Commonwealth Freedom of Information Act

Under this Act, people can normally obtain access to information held about them by Commonwealth Government departments and authorities, eg. the Department of Social Security. This Act does not apply to state government bodies or non-government bodies. Further information about using the Act is in The Law Handbook (see **Further Reading**). (New South Wales drafted a similar Act a number of years ago but has not brought it into effect.)

Informal access

There is no harm in asking for information. After all, it is about you or someone you are close to. Ask questions and, unless there is a good reason for a refusal to answer, keep asking. If you don't understand the answer, ask to have it explained more simply.

The NSW Privacy Committee will often help people obtain information which they reasonably want about themselves. The Committee cannot force a body to hand over information but its official status often enables it to persuade the body to be reasonable. The Committee will act in this role in relation to government and non-government bodies. The Privacy Committee can tell you whether a department has a policy on release of information. It will also deal with complaints about breaches of those policies.

Some State government departments have official policies about when information should be released, for example, the NSW Department of Health's is contained in circular 82/369, 'Confidentiality of Health Records in Hospitals and Community Health Services'. This circular states that access to information should be provided unless its release would not be in the interest of the person's health. It also gives a right of appeal where access is refused.

There is one important question that the circular does not deal with. This is the question of when relatives or friends should be given access to information about disabled people whose disabilities prevent them from requesting information for themselves. This is a difficult question but one which the Department should address itself to.

(9) Use a Citizen Advocate

A ***citizen advocate*** is an ordinary member of the community who becomes a long-term friend and adviser for an intellectually disabled person. The advocate can help the intellectually disabled person solve a problem or can solve it on behalf of the disabled person, eg. by complaining to the Ombudsman about wrong conduct by a government department.

Ideally most citizen advocates would be trained by and registered with a local citizen advocacy office. However, there are currently only four such offices funded in NSW (see **Contact Points**). Accordingly, many people become citizen advocates simply by forming a friendship with a disabled person. No citizen advocate has any formal legal status. However, government departments and other organisations are developing greater recognition of the value of citizen advocacy and thus are often willing to give advocates the same sort of informal recognition that they give to the next of kin of disabled people.

(10) Take It to Court

Where the legal rights of disabled people have been infringed, court action can be commenced to enforce them. Intellectually disabled people can take court action in the same way as other people. Sometimes another person, referred to as a 'tutor' or 'next friend', acts on their behalf during court proceedings. This would normally be a relative, friend or citizen advocate.

It is often important to choose a solicitor who is familiar with the area of intellectual disability. If you want a referral to a solicitor you can contact Redfern Legal Centre or Macquarie Legal Centre (see **Contact Points**).

Are intellectually disabled people allowed to give evidence in court? Yes, so long as they understand that they have promised to tell the truth and that telling a lie is against the law.

Normally, a court case has to be commenced within a set period, often six years. However, this period extends to 30 years if a person is intellectually disabled to such an extent that it would be hard for them to realise they should be starting the case. For example, where a person's severe disability was caused by a doctor's negligence when the person was being born, the person will have 30 years to sue.

Legal action against Federal government departments about their administration is governed by two Commonwealth laws: the Administrative Decisions (Judicial Review) Act and the Administrative Appeals Tribunal Act. These Acts give people the

right to challenge certain Commonwealth departmental decisions. They also give the applicant the right to know the facts upon which the decision was based and the reasons for that decision. The decision must have ***adversely*** affected the person challenging it, for example a person could ask for a review of certain decisions about their pension. Usually the decision complained of is an incorrect or inappropriate ***implementation*** of Government policy.

General decisions about the formulation of government policy are usually not reviewable, for example, a decision to only fund group homes if they are close to shops and transport. For more information look at The Law Handbook (see **Further Reading**).

(11) Getting Legal Aid

Legal aid is available to intellectually disabled people in the same way as to other people, ie.there is both a means test and a merits test.

Intellectually disabled people are usually receiving social security benefits or pensions and are eligible for assistance from the Australian Legal Aid Office. Other people may be assisted by the NSW Legal Aid Commission. The disabled person's solicitor will make the application for legal aid. Both Redfern and Macquarie Legal Centres have a particular interest in the legal problems of intellectually disabled people. Both provide free advice and referral (see **Contact Points**).

(12) 'I Don't Know Where to Complain!'

If you don't know what to do about a problem, you can get advice from places like the Intellectual Disability Rights Service at Redfern Legal Centre and Macquarie Legal Centre (see **Contact Points**).

DISCRIMINATION

Anti-discrimination law aims to ensure that everyone has an equal opportunity to get the things in life we all need — a place to live, a job, a public education. It doesn't give an intellectually disabled person (or anyone else) special rights. Rather, it tries to ensure that such a person will have equal access to these basic things in life, and it makes it unlawful to discriminate against them by treating them less favourably because of their disability.

Anti-discrimination law in this State is contained in three pieces of legislation. Two Commonwealth Acts deal with race and sex discrimination — the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984. These Acts are not directly relevant to intellectually disabled people, except where sex or race are concerned.

The third Act, the NSW Anti-Discrimination Act 1977 deals with discrimination on six different grounds:

(i) Race (including colour, nationality or ethnic origin);
(ii) Sex;
(iii) Marital status (i.e. whether you are single, married, divorced, separated, widowed or living in a de facto relationship);
(iv) Physical impairment (any physical impairment, whether it has existed since birth, or is a result of illness or injury);
(v) Intellectual impairment (any intellectual impairment, whether it has existed from birth or is a result of injury or illness); and
(vi) Homosexuality.

If intellectually disabled people are discriminated against on grounds other than their disability, they can complain on those grounds. An example is sexual harassment by a manager in a workshop. This would be unlawful on the basis that it is discrimination on the ground of sex. This chapter deals with discrimination on the ground of intellectual disability but the general explanations apply to the other grounds too.

(1) What is Discrimination?

There are two types of discrimination: direct and indirect. ***Direct discrimination*** occurs when a person treats another person less favourably than she or he would treat others in the same or similar circumstances, because of that person's intellectual disability.

Direct discrimination is usually shown in individual actions, eg. by an employer not employing a particular disabled person; or by a number of actions, eg. a landlord who will not let her or his house to disabled people.

Evidence of this type of discrimination can be in statements such as 'I won't employ you, you're handicapped' or in patterns of behaviour, such as a landlord who lets her or his house to groups of non-disabled people but not to disabled people even though there are groups of these people who are willing and able to pay the rent.

Indirect discrimination is often harder to prove. It occurs when a person or organisation, without good reason, institutes rules, policies or practices which result in discrimination against one of the groups (or a particular member of a group) protected by the Act. In this case, the person's intention is irrelevant. Even though the rules may be applied impartially, if their effect is to make it more difficult for intellectually disabled people, for example, to enjoy the facilities or advantages available to others, then it is unlawful discrimination.

An example of indirect discrimination is where an employer who needs someone to do packing work insists that only people who can read fluently can have the job. As there is no good reason for this requirement in this job, and as its effect is to discriminate against intellectually disabled people (amongst others), this is unlawful.

(2) When is Discrimination Unlawful?

Not all discrimination is prohibited. However, the Act covers the main areas of public life and includes:

(i) Getting a job or promotion;
(ii) Renting a place to live or staying in a hotel;
(iii) Attending a public education institution, eg. a school or technical college;
(iv) Getting insurance or a loan;
(v) Being a member of a registered club;
(vi) Going to the movies or a restaurant; and
(vii) Some advertising, eg. for employment.

What does this mean for intellectually disabled people?

Employers can no longer automatically exclude disabled applicants. A person with an intellectual disability must be allowed to apply and be considered for any job that she or he can do and be considered on the same criteria of merit and ability as the other applicants.

Landlords, hotel managers, real estate agents and boarding house operators should not refuse accommodation because of a person's disability. Applicants should be considered on their ability to meet rental commitments and any other tenancy requirements.

A disabled person cannot be refused membership or the use of facilities by a registered club, unless special facilities are required and cannot reasonably be made available.

Intellectually disabled people have the same rights as other consumers to buy goods and services. Services include such things as credit and finance, seeing a movie, travelling on a bus, hiring a lawyer or carpenter. Shopkeepers cannot refuse to serve disabled people.

(3) Are There Exceptions?

A few exceptions relevant to the ground of intellectual disability are:

(i) Discrimination by employers who employ fewer than 5 workers;
(ii) Discrimination by private educational authorities;
(iii) Discrimination by voluntary organisations; and

(iv) Discrimination by an employer where she or he had reasonable cause to think that the disabled person would be unable to carry out the work or would require services or facilities which it would be unreasonable to require the employer to provide.

There are also exceptions which make it hard to complain about discrimination by the Department of Education.

Who is Intellectually Disabled?

The Act covers people defined as 'intellectually impaired'. This is someone who is limited in a major life activity, such as learning or self-care, because of a defect or disturbance in the structure or functioning of the brain, whether present at birth or caused by an illness or injury. The Act includes people who have normal I.Q.'s but who have learning difficulties.

(4) How to Complain

Anybody who thinks they have been discriminated against should contact the Anti-Discrimination Board (See **Contact Points**). If a person is unable to complain themselves, someone else may do it on their behalf (see **below**). You can ring, write or visit the Board. The people there will give you free and confidential advice. Before they will investigate though, you must make a formal complaint. This must be signed and in writing. It can be done on a Complaint Form (available at the Board's office) or it may be just a letter. It may be in any language.

If you can't visit the Board, ring them, and they may be able to send someone to visit you. Upon receipt of a formal complaint, the Board investigates and then attempts to conciliate between the two sides. Most complaints are settled in this way to the satisfaction of both sides. If the complaint is not resolved, it may go to a public hearing by the Equal Opportunity Tribunal. The Tribunal has the power to make various orders, for example, for reinstatement in a job, and to award damages (compensation) of up to $40,000. Remember, damages are compensation for loss or injury suffered — they are not awarded as a punishment to the other party.

(5) Complaining on Behalf of Someone

A complaint may be made on behalf of an intellectually disabled person provided they 'express a desire' that this happen. It is not clear what behaviour is sufficient to 'express a desire'. However, the Anti-Discrimination Board says that they would accept the complaint in the following two circumstances:

(i) Where the intellectually disabled person has signed a letter authorising another person to make a complaint for them; and

(ii) Where a third and independent person makes a statutory declaration stating that she or he has heard the disabled person indicate that they would like the other person to pursue the complaint for them.

Some intellectually disabled people would not be able to 'express a desire' in these ways. The law needs to be changed so that they are not excluded from using the Act. In the meantime, the Board would probably informally deal with a complaint made on behalf of such a person. However, the complaint could not go as far as the Equal Opportunity Tribunal. At present the Anti-Discrimination Act discriminates against ***very*** disabled people!

(6) Complaints by Groups of People

If a group of people have the same or similar complaint, it is sometimes possible to bring a representative complaint. That is, one person makes the complaint on behalf of the group.

(7) Legal Aid

Legal Aid has been granted in a number of anti-discrimination cases. (See section on legal aid in Chapter 1 **Protecting Your Rights**.)

(8) Victimisation of Complainants

The Anti-Discrimination Act makes it unlawful for anybody to harass or victimise someone who complains of discriminatory conduct. For example, a disabled worker sacked for complaining about not getting equal treatment with other workers could probably get a reinstatement order.

If you think you or someone you know has been discriminated against, contact the Anti-Discrimination Board. For address and phone number, see **Contact Points**.

PERSONAL RELATIONSHIPS

An intellectually disabled person normally has the same right as anyone else to have friendships, sexual relationships, to live with someone or to marry, and to have children. Other people such as parents will provide intellectually disabled people with advice to help them exercise these rights sensibly. However, unless a person has a guardian, legally the final decision about personal relationships is her or his own.

(1) Sexual Relationships

If an intellectually disabled person is over the legal age of consent they can have sexual relationships. These can be either heterosexual or homosexual relationships. A parent cannot legally prevent a child who is over the age of consent from having sexual relationships.

The legal age of consent for girls to have heterosexual relationships is 16. Boys cannot lawfully have homosexual relationships until they are 18. For some reason, the law sets minimum ages for these, but not for girls to have homosexual relationships or for boys to have heterosexual relationships.

Disabled people also have normal protection against unwanted sexual advances. It is a sexual assault and a criminal offence to have sex with a disabled person who does not freely consent.

(2) Marriage

Anyone can marry if they are old enough and they understand the nature and effect of the marriage ceremony. Very often there is no legal reason why an intellectually disabled person may not marry.

Generally, girls can marry at 16 and boys at 18. In some circumstances, however, they can marry earlier with the consent of their parents and/or a court.

The Family Law Act covers breakdown of marriage relationships, and problems about maintenance, custody and access and division of property.

When a marriage breaks down and the parties separate, the Family Court may order one partner to pay ***maintenance*** to the other. ***Maintenance*** is the payment of money by one ex-partner to the other as a contribution to the upkeep of the child or children. (Sometimes maintenance can also be paid for the ex-partner. A common example is where the parent with custody can't work because of a lack of suitable child care while the child is small.)

A maintenance order for a child will generally cease when the child turns 18. However, when the child is intellectually disabled, the maintenance period can be extended by the court.

Custody is the care and control of the child or children. There is no legal rule that a disabled person is an unfit parent. However, the court would have to be satisfied that a disabled parent is aware of the needs of the child and can support the child either by themselves or with assistance from friends, family or government agencies.

Access is the arrangements made for the child to see other people, normally the parent who does not have custody. Access is the child's right to see and know their parents, and is ***not*** a right of the parent.

An application to the Family Court for custody of or access to a child of a marriage can be made ***by any person***. They don't have to be a relative. It is only necessary that what is proposed is in the best interests of the child. This application can be made ***at any time***. It is not necessary that the parents of the child be separated or involved in a marital dispute. If, for example, the parents of an intellectually disabled child unreasonably limited the child's outings with a relative or friend, the relative or friend could ask the court to override the parents.

As a general rule, in deciding matters such as maintenance, custody and access, the court will have regard to the best interests of the children. Usually there is no legal reason why intellectually disabled parents should be disadvantaged in these matters.

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(3) De Facto Relationships

Living together in a sexual relationship without marrying is often called a ***de facto relationship***. Recent changes in the law mean that de facto couples have many of the same rights and responsibilities as married people.

For example, if the couple breaks up, the parent who has custody of the children can claim maintenance for them and sometimes for her or himself from the other parent. Either partner is entitled to ask the court to divide up property which is jointly owned, or in some cases, to claim property which is in the name of the other partner.

(4) Having Children

Serious problems often arise for intellectually disabled people if they want to have children, for example, other people, perhaps their parents, or authorities, may think they should not have them.

Family planning

Having children often puts a severe financial and emotional strain upon the individual(s) and/or their relationship. Contraception can be used to prevent or plan a family. The choice to use contraception, and the form of contraception to use, is up to the individual(s) concerned. The Family Planning Association or your own doctor can advise about contraception (see **Contact Points**).

Abortion

Abortion is legally available in many situations in NSW. Legal termination of pregnancy is the woman's choice. No one can legally make a woman have an abortion, nor can they stop her if the decision to have an abortion is an informed one.

Sterilisation

Both women and men can undergo surgery for sterilisation (the operation is a more complicated one for women than for men). Sometimes intellectually disabled people are sterilised without good reason. A sterilisation is illegal if it is carried out without 'informed consent'. Where an adult is incapable of making the decision, a sterilization would not normally be lawful without approval from the Supreme Court. If there is a ***good medical reason*** for the operation, a parent can decide for a child, at least if the child is under 16. (For more details about 'consent' see Chapter 10, **Care Givers**).

(5) Child Welfare

If a child is badly neglected or mistreated or there are serious problems with discipline, the State government may become involved. This is done by 'laying a complaint' that the child is ***neglected*** or ***uncontrollable***. The situation is then looked at in a Children's Court. The Child Welfare Act gives the Court power to decide what should be done to help such a child. In extreme cases the child may be committed to the care of the Minister of Youth and Community Services as a ward.

The Children's Court does not assume disabled people are incompetent parents. Its concern is for the welfare of the children. If children of disabled parents ***are*** being neglected it is important that the parents admit to themselves that there are problems. There are people and places that can help. It helps if the parents take steps to learn how to care for the children and make use of community support services. In such a case the Court and the Department of Youth and Community Services will be sympathetic to the ideal of keeping the family together.

(6) Adoption

The consent of the parent(s) is normally required before the Court can make an adoption order. The Court will refuse to make an order where there is not ***proper consent***. This is the case when the consent is obtained by: fraud; duress; improper means (eg. false promises or undue or unfair influence); or where the person giving consent did not fully understand what they were doing.

The Court ***may*** dispense with consent where the parent is incapable of properly considering the question because of her or his mental or physical condition (this could include intellectual disability). However, the Court will require extensive information on the circumstances of the child and family before dispensing with consent. Where adequate arrangements have been made for the child (eg. where she or he is being cared for by the grandparents or other people with whom the child has a good relationship) the Court is unlikely to upset the arrangement.

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SHELTERED WORKSHOPS

There is no special law setting out and protecting the rights of workers in sheltered workshops. The relevant law is the law relating to employment. This consists of industrial awards, the common law and legislation. Each of these will be looked at in turn and mention made of what they provide for most workers and what they provide for intellectually disabled workers. It will be seen that the position of intellectually disabled workers is unclear. It will become much clearer if intellectually disabled workers sue employers who treat them unfairly. This will give the courts a chance to decide how the law applies to disabled workers.

(1) Basic Worker's Rights — The Common Law

The common law is a body of law made up of judges' decisions in individual cases. Over centuries of deciding about work arrangements the judges have developed a number of contractual promises, or basic terms, which apply in most employment relationships. They are generally based on common sense and community notions of fair behaviour. Examples of these terms are that an employee is entitled to sick pay, that an employer must provide a safe workplace and that an employee is entitled to reasonable notice of dismissal.

The courts can only infer these common terms where there is a ***contract of employment***. Workers are then ***employees***. The courts have developed a number of tests to decide whether a contract of employment exists (it doesn't depend on the parties' views). Some of the things which may indicate a contract of employment are whether another person has control over ***what*** and ***how*** the person works, and the fact that the worker ***cannot*** delegate her or his work to another person.

Virtually all workers have contracts of employment and therefore the protection given by the basic terms referred to above. These days this protection is rarely needed as workers' rights — frequently better than their common law ones — are contained in and protected by awards and legislation.

The common law position of workers in sheltered workshops is unclear. It has generally been assumed, it seems, that they are ***not*** 'employees'. We have studied the relevant law and applied the tests that the judges use, and we think that many people working in sheltered workshops do come within the common law definition of 'employee'. But there has been no case on it and until there is, their common law protection is unsure.

The common law is important in another way to workers. Most of the relevant Acts and the award system use common law definitions — particularly that of the 'employee', that is, someone with a contract of employment — as the basis for their entitlements.

(2) Awards

Industrial awards are legally binding court orders. They set ***minimum*** standards for wages, penalty and over-time rates, sick pay entitlements, rights to information about pay and any deductions made, and many other detailed requirements for work conditions.

Awards are the main source of terms and conditions of work for 90% of Australia's workforce. There are currently ***no*** awards for workers in sheltered workshops, however, these workers might be able to obtain awards if they joined existing unions or formed a union of their own which then applied to the court for an award.

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(3) Legislation

A number of Acts of Parliament provide benefits for workers. The following are the most important.

Worker's Compensation

Very broadly, the Worker's Compensation Act sets up a compulsory insurance scheme for employers to enable them to pay compensation to workers injured in the course of their employment or while travelling to and from work (the cause of the accident and 'fault' are generally not relevant). The Act covers workers in NSW who are 'employees' (using the common law definition), and some others , such as 'independent contractors' and their employees, and people paid by commission. It does ***not*** cover casual employees, ie. people who work for one period only of not more than five working days ***and*** who are employed otherwise than for the purpose of the employer's trade or business.

We think that many people working in sheltered workshops would come within the cover of this Act, either under the common law definition or under one of the specific categories mentioned above. There has been no decision on this, however, and the situation remains unclear. Some workshops do take out Workers' Compensation insurance. (Remember insurance is only legally required when the employees are covered by the Act.) The Association of Rehabilitative Facilities Ltd. encourages its members, we believe rightly, to take out insurance. Note that an injured worker who is within the Act's protection and whose employer is uninsured, may claim compensation from a special fund. The employer, in such a situation, may be liable to substantial penalties for failing to take out insurance (up to $100 per day).

Annual holidays

The Annual Holidays Act grants workers in NSW four weeks' annual holidays on ordinary pay. The entitlement arises one year after starting work and holidays must be taken within six months of their falling due. Entitlement is based on the common law definition of 'employee' but also includes: people paid by commission; piece-work workers; independent contractors; and part-time or shift workers. Again, we think that this would cover most workers in sheltered workshops but there is no ruling on it. Interestingly, most workshops seem to provide this benefit.

Long service leave

The Long Service Leave Act covers essentially the same people as the Annual Holidays Act. It grants all these workers two months'

paid leave after ten years' continuous service (which can sometimes be with different employers) and one month's paid leave for every five years' work after that. We think sheltered workshops are normally bound to provide this benefit, but there has been no case deciding the point.

Safety standards

The Factories, Shops and Industries Act requires sheltered workshops to be licensed. Workshops must comply with certain minimum standards but these are basically concerned with sanitation, the size of workrooms, and with some basic safety provisions, such as requirements for the fencing-off of dangerous machinery. It also limits the ages of people who can work in factories or workshops and operate certain machinery.

The Child Welfare Act also requires sheltered workshops to be licensed, this time by the State Department of Youth & Community Affairs (see **Contact Points**). The regulations to the Act prescribe certain minimum standards of hygiene and safety (as in the Factories, Shops and Industries Act, above) and also the keeping of certain records and accounts. The Child Welfare Act should soon be replaced by the Community Welfare Act which will hopefully allow regulation of a much wider range of standards.

Unfair work arrangements

The NSW Industrial Commission has the power to vary some unfair work arrangements. The Commission ***may*** be able to do this where, for example, workers in a workshop are not paid a fair wage. The Commission might order that the wages be increased ***and*** that compensation be paid for past low wages.

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(4) Setting Standards in Workshops

The Association of Rehabilitative Facilities Ltd has developed a ***Code of Ethics*** which provides a guide to its members for the running of sheltered workshops. It contains very broad expressions of policy and the Association should be applauded for its concern. While some workshops are undoubtedly very responsible in their treatment of their workers, providing many of the benefits mentioned above, there should be ***uniform*** standards for all workshops which are compulsory and capable of enforcement. ***Accreditation*** may achieve this goal.

Accreditation of sheltered workshops is a scheme being developed by the Australian Council for Rehabilitation of the Disabled (ACROD) and the Department of Community Services (DCS). ACROD has piloted an Accreditation Standards Manual with the aim of devising a scheme of workable standards with which all workshops will have to conform to gain benefits from the DCS. Unfortunately, the manual contains both 'standards', which are intended to be compulsory, and 'goals' which are aims that a workshop should be working towards. We believe that many of the 'goals' are the rights of every worker and so should be compulsory for disabled workers too.

(5) Work Contracts

In the meantime workers can gain some protection by negotiating work contracts with their employers. These would spell out the rights and obligations of worker and employer. Workers should be assisted, preferably in groups, to negotiate these contracts. Workers can negotiate these contracts whether or not they are 'employees'. Very many intellectually disabled workers would have enough understanding to enter into a binding work contract. Hopefully those who are less able could be protected by being included in group contracts.

(6) Future Goals

The unsatisfactory situation of workshop workers will be clarified by the courts if workers who have been unfairly treated sue their employers, the workshops. It is always worth considering this. In a recent case in Sydney, for example, a man was dismissed from a workshop where he had worked for 12 years. He was given no notice or other benefits. Redfern Legal Centre wrote to the workshop threatening court action. The workshop then paid the full

amount requested: one month's pay in lieu of notice; holiday pay; and long service leave entitlement. What is really needed, however, is legislation setting minimum standards in ***all*** workshops. This could be done by an Act setting out detailed requirements for the running of workshops, which employ (whether paid or not) intellectually disabled people. Specific provision could be made for Acts such as the Worker's Compensation, Annual Holidays and Long Service Leave Acts to apply.

An alternative is to make compliance with certain standards a pre-requisite for a licence, licences being compulsory. Licensing is a government responsibility, but compliance with, and the setting of, minimum standards of work conditions could be the responsibility of the Australian Council for Rehabilitation of the Disabled through its accreditation programme.

It is suggested that ACROD is the most suitable body to administer such a scheme as it has experience in the particular needs of intellectually disabled people and the peculiar difficulties of running a workshop which must be competitive on the open market. It is up to the government to make participation in such a scheme desirable and economically feasible for the workshop managers. This can be done with the co-operation of the Department of Community Services.

(7) Discrimination and Harassment

Regardless of an intellectually disabled person's employment status, her or his rights at the workplace are no different to anywhere else. For example:

(i) Discrimination on the ground of intellectual impairment is illegal;

(ii) Sexual harassment — which can be physical interference, repeated propositioning, repeated sexual jokes or innuendos, or offensive gestures — is illegal;

(iii) Detention and segregation can be illegal and can constitute the offence of false imprisonment;

(iv) Body searches are illegal and an assault;

(v) Any physical interference including that undertaken for 'research' purposes may be illegal unless done with the ***informed*** consent of the person concerned; and

(vi) Verbal abuse and/or threats or intimidation can be an assault and unlawful.

HOUSING

This chapter is concerned with residential facilities such as boarding houses, group homes and nursing homes. In relation to housing, there is usually no difference in the legal rights of people living in government controlled facilities and people living in private dwellings. (We are not talking here about involuntary patients in psychiatric hospitals. There are people who have been ordered to stay in hospital under the Mental Health Act. There should not now be any intellectually disabled people in this category unless they are also mentally ill.)

(1) Renting

Disabled people have the same rights as others who rent premises. Their rights (and obligations) depend on the ***contractual basis*** of their living arrangement. This will be either a 'lease' or a 'licence'. A lease indicates a ***tenancy*** relationship and usually gives the tenant many more rights than a licence. Most intellectually disabled residents will have a licence, not a lease. This is normally because they will not have a ***right*** to exclusive possession of the premises (ie. someone else, usually the proprietor, can enter their room at any time). Normally, if you have a flat you will have a lease. If you only have a room, it will normally be a licence.

If a resident is having problems with the terms or conditions of their housing, and negotiation has failed, they should seek legal advice. The Chamber Magistrate at the nearest Local Court (see the front of phone book under State Government) is often helpful in this type of situation. They give free legal advice. Remember that under any lease or licence, the landlord has some ***obligations***. For example, in many instances she or he has a duty to make all reasonable repairs to the premises. If you are being threatened with eviction, you must act quickly.

A ***tenant***, that is a person with a lease, cannot be evicted without a court order. If you get a notice to go to court, consult a solicitor or Chamber Magistrate and she or he may be able to arrange legal representation. You can usually at least get a few weeks' grace to allow you time to find new accommodation.

A ***licensee*** can often be evicted without a court order and with little or no notice period. This will depend on the terms of the particular agreement. Even licensees however may be able to gain some time or compensation if legal action is taken on their behalf.

Legal action about housing will usually be in a Local Court and can be relatively inexpensive (depending on your solicitor). However if, say, the residents of a group home were to be evicted contrary

to the agreement with the owner or proprietor, there might be no useful legal remedy available in the Local Courts. To get the landlord stopped, you might have to go to the Supreme Court and get an ***injunction***. Legal action in this court is very expensive but legal aid may be available.

Whatever the problem that arises, your legal position will be much clearer and stronger if your rights are spelt out in a written agreement when you move into the premises.

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(2) Controls over Residential Facilities

Government supervision of residential facilities takes several forms. General requirements (eg. fire standards, hygiene) are administered by local government and state government authorities. The NSW Department of Youth and Community Services (YACS) has specific power to license residential facilities for disabled people. This power will eventually be contained in the ***Community Welfare Act*** which has not yet come into effect. The current powers are contained in the ***Child Welfare Act*** and the ***Youth and Community Services Act*** and extend to all privately run residential facilities which cater for more than two residents who are not members of the proprietor's family. The types of issues which the licensing branch is concerned with are ***quality of life*** issues. These include:

(i) Ensuring adequate food, heating and safety standards;
(ii) Ensuring proper sanitation and hygiene requirements are met; and
(iii) Preventing abuses of human rights and restrictions on residents' freedom (for example, preventing misappropriation of residents funds by boarding house proprietors).

Bringing problems to the attention of the YACS licensing branch can force private residential facilities to raise their standards. Sometimes YACS de-license a facility so that it has to close down.

The licensing branch will also help in dealing with other government departments, eg. with the Department of Social Security over the payment or manner of payment of your pension.

The Health Department and its Complaints Unit also deal with complaints about most residential facilities for intellectually disabled people (especially those run by the Department and hospitals). If a complaint about a government facility is not resolved satisfactorily with the relevant department then the matter can be taken to the State or Commonwealth Ombudsman. See Chapter 1, **Protecting your Rights**.

(3) Injuries and Accidents

People injured in residential facilities can often take action against ***occupiers***. Occupiers are people in control of facilities, eg. boarding house proprietors. Normally an occupier will be liable for injury to a resident if that injury was caused by the failure of the occupier to ensure that the premises were safe. They are usually insured to cover their liability to residents.

Case Studies

Lucy is the landlord of a boarding house. Rob, an intellectually disabled resident, is injured on a staircase. The staircase was in a dangerous condition and Lucy knew this. Rob could sue Lucy, the occupier, to recover damages.

Jim is trespassing. He walks into a sheltered workshop, climbs over a barrier and injures himself by placing his hand in a machine. The workshop manager, Jean, took 'reasonable care' to fence off the machine so that people would not be injured. Jean would not be liable to Jim for the injury he suffered as she had taken reasonable precautions.

...DO YOU UNDERSTAND THE LEGAL ASPECTS OF HOUSING?
AT THE MOMENT I'm STRUGGLING WITH THE PRACTICALITIES OF GETTING THE HOUSE...

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GUARDIANSHIP AND MONEY MANAGEMENT FOR ADULTS

Guardianship of adults means giving someone the same power to make decisions for another person as a parent has with a young child. This includes deciding where the person will live or work, what education they will have and what medical treatment they need (eg. operations). (Guardianship is different from money or 'estate' management which is control over a person's money and property.)

Any ***rights*** you have over a person are really part of your responsibility to them. A guardian's rights are part of her or his responsibility to act in the best interests of the other person. The most common guardianship relationship is between parents and children. Normally, the parents' legal obligation to provide for a child ends when the child turns 18, as does their ***right*** to control or to make decisions on behalf of their children. This is also the case for ***intellectually disabled people*** unless a guardianship order is made.

Legally, unless there is a guardianship order the parents are no longer the guardians of their intellectually disabled child once that child reaches 18. (In some cases, a parent ceases to be the guardian much earlier because the child has been made a state ward.)

In this chapter we discuss ***what you can do*** under the present law and the changes to the law which have been proposed.

(1) The Present Law on Guardianship

Until recently, there were two general ways to impose guardianship on intellectually disabled adults. The person could be made a compulsory patient in a psychiatric hospital, in which case the Superintendent of the hospital became her or his guardian. Otherwise, an application could be made to the Supreme Court for the appointment of a guardian under Section 38 of the Mental Health Act.

In a 1983 case, however, a court decided that intellectual disability is not within the definition of 'mental illness' in the Mental Health Act, so that these ways could not be used to impose guardianship on intellectually disabled people.

There remain three ways, all of them of limited use, of imposing guardianship.

Application to the Supreme Court

The Supreme Court has what is called 'inherent jurisdiction' or power to make orders for guardianship of profoundly and severely disabled people. There is no such power in relation to mildly and moderately disabled people. In relation to a severely or profoundly disabled person, any interested person could apply to the Court for a guardianship or access order. However, the Court will only make an order if there is some specific reason for it. This reason might be a dispute about where a person is to live or about how often and in what circumstances she or he may see a particular friend or advocate.

'Wards of Court'

If an intellectually disabled adult is unable to give an 'informed consent' to an operation, the Supreme Court ***may*** be able to make the person a 'ward of court' and give the consent for them. Anyone interested in the disabled person's welfare could ask the Court to do this. This procedure may also be available for other decisions that need to be made about an intellectually disabled person.

'State Wards'

If an intellectually disabled person was a state ward under the Child Welfare Act when she or he was a child, the wardship can be continued when the person becomes an adult. This is under Part IX of the Child Welfare Act. However, this can only be used if it is applied for before the person reaches eighteen.

The law clearly needs reform. The procedures that are available are unwieldy and normally very expensive to use. If a mildly or moderately disabled person needs a guardian, normally nothing can be done to appoint one. Furthermore, it is unclear when 'wardship of court' can be used.

(2) Proposed Changes to the Law

The NSW Government set up a working party in 1984 to recommend new laws in this area. The NSW Council for Intellectual Disability was represented on the working party. Set out below are the sort of principles which the Council pressed to have included in the proposed legislation. These principles are along the lines of those contained in proposed legislation in Victoria and Western Australia and in legislation operating in parts of Canada and the United States.

When is a guardian needed?

Intellectually disabled people should be allowed to make their own decisions if they can. Also, guardianship should not be imposed where there is a less restrictive alternative available. The reason for this is that every intellectually disabled person is entitled to the maximum practicable freedom. This freedom is a basic right and also encourages intellectually disabled people to develop their abilities to make their own decisions and look after themselves. This maximum freedom, of course, must be balanced against the needs for protection and control that intellectually disabled people may have. But if a less restrictive alternative will meet a person's needs, then that alternative should be used.

The most obvious of these less restrictive alternatives is continued parental guidance. While ***legal*** parental guardianship ceases at 18, this informal guidance has often continued after that age. In such a situation a parent ***cannot*** legally control an intellectually disabled adult but may continue to provide protection and guidance. Other less restrictive alternatives are citizen advocacy and the provision of programmes and services to help intellectually disabled people look after themselves.

When will these alternatives not be sufficient, and will it be necessary to consider a guardianship order? If there is a dispute, guardianship may have to be considered. For example, a parent and an intellectually disabled adult may disagree about where the disabled person should live, or there might be a dispute between a citizen advocate and the management of the place where the disabled person lives about where they should work. It is best to first try and resolve disputes by talking, perhaps with the help of a person such as a social worker. However, if the dispute cannot be resolved in this way then a guardianship order would have to be considered.

Who should make guardianship orders?

The Council for Intellectual Disability has been pressing for guardianship orders to be made by a tribunal of experts in the field of intellectual disability. These experts might include people with formal training such as social workers, psychologists and lawyers. They should also include people with informal training, such as parents and citizen advocates. A tribunal would have the advantages of being more informal and cheaper than the Supreme Court. All relevant people would be able to express their point of view to the tribunal and place evidence before it. The tribunal would also be able to call for further evidence if it wished. Through these procedures and the expertise of its members a tribunal would be able to make the best decisions about guardianship.

Who should be the guardian?

There is no reason why this should not simply be the most suitable person, taking into account the wishes of the disabled person and existing family relationships. Where there is no suitable person available then there needs to be a public official with a name like 'The Public Guardian' to act as a guardian of last resort.

What should guardianship involve?

Guardianship should not be a matter of all or nothing. A guardianship order should be tailor made to fit the needs of the particular disabled person. Some disabled people would need a guardian to make all their decisions for them. This is called ***plenary guardianship***. However, many disabled people will only need a guardian for a limited range of decisions.

A particular person might, for example, need a guardian to decide where she or he is to live and work but not in relation to more day to day matters. A guardianship order could be made for this person which only allowed the guardian to legally decide where the person was to live or work. This is called ***limited guardianship***.

In deciding what order to make, the tribunal should use the same principle as that used in deciding whether an order should be made at all. Namely, what is the least restrictive alternative that suits the person's needs. After a guardianship order is made it should be regularly reviewed. The tribunal could then check that the order was working well and perhaps alter the order to suit the changed needs of the disabled person.

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Consent to medical and dental treatment

This is an area of guardianship which needs particular attention. The law is that a doctor or dentist should not carry out a treatment without obtaining an 'informed consent'. This requires that the patient (or the patient's guardian) consent to the treatment with a broad understanding of what is involved. (For more information see the section **Consent** in Chapter 10.) It would, however, be impractical to expect doctors and dentists to always comply with this law. What normally happens is that if the disabled person is not able to consent then the doctor or dentist proceeds with the informal consent of the person 'in apparent charge' of the disabled person. This practice could be made legal for normal day to day medical and dental procedures.

Informal consent, however, should not be sufficient for sensitive procedures such as abortions, sterilisations and tissue transplants. Before one of these sensitive procedures is to be carried out, the facts should be laid before the proposed tribunal and the tribunal should then make the decision.

(3) Money Management

Some intellectually disabled people are able to manage their own financial affairs, such as their pension or pay, a bank account, or whatever. They are entitled to do so. If someone else has their property or money, even if only because they are looking after it, the disabled person can demand it back.

Many disabled people, however, do not have the ability to manage their own affairs. Who then can legally control any money or property? Where the intellectually disabled person does not have much property ('property' is any asset, it need not be land), it can often be informally managed and administered by a friend, family member or care giver organization. Strictly speaking, these people do not have a legal ***right*** to do this. Practically, it is often the best way to handle the situation. Provided the money or property is not improperly used, there is no danger of conflict with the legal system. The duties and legal liabilities of these 'informal' property managers are dealt with below.

Sometimes there may be a need to appoint formal 'property managers', eg. where the informal arrangements are being abused or are impractical, or where there is a lot of property, such as a compensation award or large sum of money left by someone's will. Formal property managers can be appointed under the Protected Estates Act, 1983. A relative, friend or care giver can apply to have themselves, another suitable person or the Protective Commissioner

appointed to manage the disabled person's property (see **below**).

There are some types of management which deal with only part of a person's property. These are: the 'warrantee' system for looking after a person's pension; and hospital trust accounts (see **below**).

(4) Informal Money Management

Often relatives, friends and care giving organisations look after a person's money without being officially appointed property managers. Usually the informal manager can sign on the disabled person's bank account. In these situations two basic rules apply.

First, the person looking after the money should keep it somewhere safe but at the same time ensure that a reasonable interest rate is obtained. Normally a bank or building society will be the best place to keep the money. The money should be kept in a separate account in the disabled person's name and not be pooled in an account with the money of the other residents of the place where the disabled person lives. Normally the account should have two signatories, ***both*** of whose signatures are required for any withdrawal.

Secondly, the money and the income it earns must only be spent on the disabled person. It must not be spent on other people. For example, a television set could be bought for the intellectually disabled person's own use, or perhaps for her or his use in the place where she or he lives and where it may also sometimes be used by other people. But it should not be bought if, say, she or he did not want one or would not use it. The reason for the purchase must be the benefit of the individual and not the benefit of the residents as a whole.

If a disabled person loses money through breach of the above rules, she or he (or someone on her or his behalf) would probably be able to sue for the lost money. As explained above, if informal arrangements are impossible or impractical, formal management can be organised.

(5) Formal Money Management — The Protected Estates Act 1983

'Estate' is a legal term meaning the whole of someone's money and other property. There are two main ways that the estate of intellectually disabled people can come under management under the Protected Estates Act:

(i) People whose property was already under management under the Mental Health Act 1958 automatically have their property come under management under the Protected Estates Act. This would include many intellectually disabled people who used to be 'involuntary patients' in psychiatric hospitals; and

(ii) An application may be made to the Supreme Court. If the Court decides that a disabled person is 'incapable of managing their affairs', the Court may order that the person's property come under management.

Applying for a manager

Anyone can apply to the Court to have a manager appointed. The Court may appoint the Protective Commissioner (who is a court official) or any suitable person (normally a close relative or friend of the disabled person) who then acts under the supervision of the Protective Commissioner. Where the Protective Commissioner is the manager, the disabled person or a relative or friend will often be allowed to handle the person's day to day affairs but the commissioner will retain overall control and handle any investment or longer term dealings. The procedure for an application to the Court is as follows:

(i) The Protective Office has prepared kits with all the necessary forms. These kits can be obtained by ringing the Protective Office (see **Contact Points**). The forms include draft affidavits (an affidavit is a piece of written evidence signed by a witness). You will need affidavits by at least two medical practitioners or other people, such as psychologists or social workers, qualified to say that the disabled person is incapable of managing their affairs. These people must have formal professional qualifications and be experienced in the field of intellectual disability;

(ii) When all of the forms have been filled in they are lodged with the Court and copies are given to the disabled person and their next of kin;

(iii) If no-one opposes the application, the judge can deal with it without anyone attending in court. If the application is opposed, there will be a hearing in court. (An application may be opposed if, for example, the disabled person feels able to look after her or his own affairs or someone thinks that the proposed manager is unsuitable).

Hopefully, many people will be able to put through the application without a solicitor. If a solicitor is used, their fees will normally be payable out of the disabled person's property. For an uncontested application these fees will often be about $1500. Unless the disabled person is well off, this will be a considerable part of their property. It may be that the Legal Aid Commission will do the legal work at no charge. (See the section on **Getting Legal Aid** in Chapter I).

The Protective Office is always available to answer enquiries and would no doubt be particularly helpful if the disabled person is not well off. For referrals to solicitors who are sympathetic and will do this type of work, contact Redfern or Macquarie Legal Centres (see **Contact Points**).

How does formal management work?

If the ***Protective Commissioner*** is manager, there are wide powers to look after the disabled person's property. Money may be spent on the needs of the disabled person and their dependants. The disabled person or a close relative or friend will often be allowed to look after the person's day to day affairs. To do this they may be given the use of the person's pension and a 'float' of, say, a few hundred dollars from which they can buy everyday things like food, clothes and toiletries for the disabled person. The Commissioner has overall control of all the property and sees to any investments, as well as dealing with any bigger financial needs or commitments.

Where a ***private manager*** is appointed, she or he acts under the

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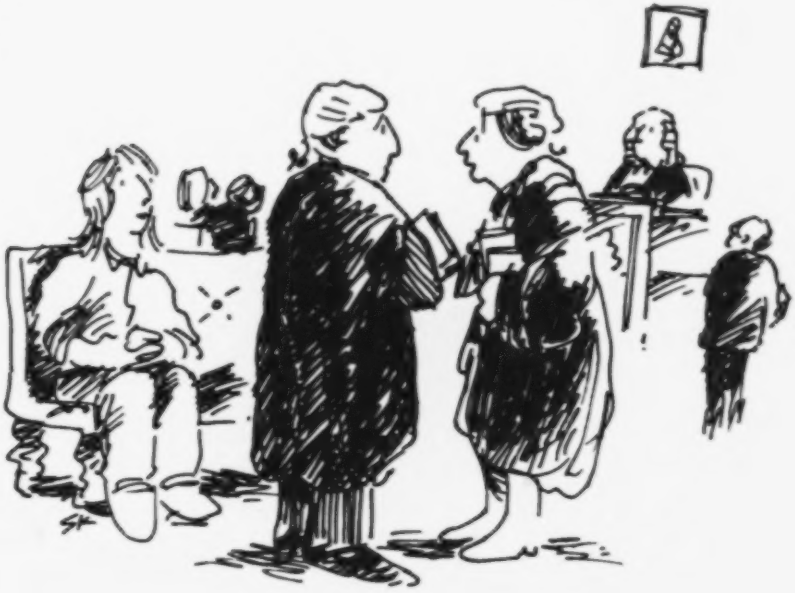
supervision of the Protective Commissioner who decides what powers the manager should have. Each year the manager has to produce accounts for inspection by the Protective Commissioner's officials. If the disabled person or a relative or friend disagrees with a decision of the Protective Commissioner, an application can be made asking the Court to overrule the Protective Commissioner.

If a person's property was placed under management by the Supreme Court, such management will only cease if the Court is satisfied that the person has become capable of managing her or his own affairs. The disabled person can ask the Court to make an order saying this. If a person's property came under management because she or he was an involuntary patient in a psychiatric hospital, then management will only cease if the person ceases to be an involuntary patient ***and*** is capable of managing her or his own affairs (to the satisfaction of the Protective Commissioner or a Mental Health Tribunal or the Supreme Court).

The Protective Office is happy to answer general enquiries (see **Contact Points**).



(6) Paying the Disabled Person's Pension to Someone Else

The Department of Social Security has the power to pay pensions and benefits to someone other than the pensioner. The money is then held by that person on behalf of the pensioner. This system is often called the ***warrantee*** or nominee system and is often used in relation to intellectually disabled persons. The 'warrantee' may be an organisation or a relative or friend. Similar rules apply to the warrantee as apply to informal property management (see above). The Department's Pensions Manual states that a warrantee arrangement 'must be reviewed immediately any allegations of misuse of the payment are received'.

(7) Hospital Trust Accounts

Under the Mental Health Act 1958 ('the 1958 Act'), a psychiatric hospital has a Patients' Trust Fund in which each patient has an account. Each patient's money can only be used for their needs but all interest earned on the Fund is paid into a Patients' Amenities Account which is used for the benefit of all the patients. If a patient's affairs are being managed by the Protective Commissioner, anything over $900 in the patient's account is paid to the Commissioner.who then looks after it.

The Mental Health Act 1983 ('the 1983 Act'), which is not yet in force, contains similar provisions except that it requires that interest be divided up proportionately between the patients' accounts, rather than being paid into a Patients' Amenities Account. Unlike the 1958 Act, these provisions in the 1983 Act will apply to all hospitals and not just psychiatric hospitals.

Two main problems have arisen in recent times in relation to hospital trust accounts. Firstly, the State Government has 'degazetted' all retardation hospitals and retardation wards of psychiatric hospitals so that they cease to be governed by the 1958 Act. However, the Department of Health has continued to apply the trust account provisions of the 1958 Act to these degazetted hospitals and wards and to some hospitals which were never governed by the 1958 Act. This means that patients have not been receiving the interest earned on their own money. Patients may well be able to sue to recover this interest.

Secondly, when an intellectually disabled person moves out of a hospital the question arises of what to do with the person's trust account. If the person's affairs are under the control of the Protective Commissioner then it should be sent to the Commissioner.

Otherwise, the hospital should give very careful consideration to what should happen to the account. Two situations arise:

(i) If the disabled person is able to look after the money, then it should of course be handed over to the person;

(ii) If the disabled person is not so able, then it would seem that the hospital has a duty to ensure that a safe system of management is set up before it parts with the money.

The Health Department's Patients' Trust Manual states that on discharge 'the patient's wishes are to be ascertained in regard to their money and their wishes met where possible'. However, the Manual also states that any trust account balance not collected prior to discharge should be sent by cheque to the patient's last known address. In the case of people not able to look after their own affairs, this is not a safe practice. However, the Manual has not yet been amended and so may still govern the practice in some Health Regions. If loss to the disabled person results from this, legal action against the Department should be considered.

WILLS

It is important for everyone to make a will. This is the case particularly if a person has an intellectually disabled child who is unable to look after her or his own property. A will can be made flexible enough to allow for improvements in a disabled person's ability. Where there is no will, a disabled child will be entitled to a share of the parent's property (unless the 'estate', that is, the property of a dead person, is small and the person dies leaving a spouse), but the law in such cases does not have the flexibility possible with a will to ensure that the share is used to the disabled person's maximum benefit.

(1) How Can I Best Provide for my Disabled Child?

There are no hard and fast rules for making adequate provision for disabled children. A number of different ways in which it may be done are dealt with below. Whichever option you choose, some things should be borne in mind.

Firstly, parents should allow for the person's expenses to increase. Parents sometimes leave only a small allowance for their disabled child, perhaps because they feel that since the child is permanently placed in an institution or other residential facility, she or he will have modest needs. But it is impossible to predict what the needs will be ten or thirty years after the parents die (eg. the residential facility may have closed down or it may have had to put its fees up to well above the pension).

Secondly, parents sometimes give all of their property to their non-disabled children and rely on them to look after their disabled brother or sister. One danger of this approach is that the non-disabled children may die first, perhaps many years before the disabled person. Where parents make much greater provision for one child than another, the Supreme Court can vary the will under the Family Provision Act (see **below**). The following are some options for providing for a disabled person through a will.

Outright gifts

This is where you leave property to the person 'with no strings attached'. It is usually not a good idea to leave large amounts of property (this includes money) outright to an intellectually disabled person but this is not always the case. Some intellectually disabled people can administer a large sum of money just as they look after their own pension and operate their own bank account.

Where a disabled person is 'absolutely entitled' to property from

a parent's estate because there is no will or the will contains an outright gift, the property is handed to them *if* they have enough understanding to look after it.

If the disabled person does not have enough understanding then the person who has administered the parent's estate (the executor or, if there was no will, the administrator) is not allowed to hand the property over to them. The disabled person may have a property manager appointed under the Protected Estates Act to manage the property (see Chapter 6, **Guardianship and Money Management**). If so, the executor or administrator hands over the property to the property manager.

If there is no property manager, the executor or administrator can either retain the property or hand it over to the Public Trustee or a Trustee Company. In all of these cases, the person ultimately holding the property has only limited powers to use the property for the benefit of the disabled person. These powers are not nearly as wide and flexible as the powers parents would normally put in their wills.

Of course, it is possible to leave some property as an outright gift but with the bulk left in trust to be managed by another person (a 'trustee') for the benefit of the disabled person.

Setting up trusts

The alternative to leaving property outright to a disabled person is to set up a trust so that the property can be used for their benefit. A 'trust' means that you appoint people, called trustees, to manage and use the property in the way and for the purposes specified in the will. The law imposes strict duties on trustees.

You can 'tailor make' the trust set up by your will to suit the needs of your family. For example, if parents only have one child and that child is disabled, they could leave all their property to be used by trustees for the benefit of that disabled person. The will should also say what happens to whatever property is left when the disabled person dies.

What if parents have three children and only one of them is disabled? The parents could leave one-third of their property as an outright gift to each of the non-disabled children and the other third could be left in trust to be used for the benefit of the disabled child. The will could also say that whatever remains of the disabled person's share when she or he dies will go in equal shares to the other two children or their families, or to, say, a charity.

The will can either be very specific about how much the trustees have to spend on the disabled person or it can give them a wide discretion. The will can also lay down rules somewhere between these two extremes.

Parents often give trustees the power to pay to, or use for the benefit of, the disabled person as much of the ***income*** of the trust as the trustees see fit. (Remember, the trustee manages both the actual property you leave, eg. by investing it, and the income from the property, eg. the interest gained from the investment.)

Often a trustee is also given a wide power to use the actual property which is being held in trust. The greatest advantage of giving these broad discretions is that they create maximum flexibility for the trustees to react to the changing needs and circumstances of the disabled person. Also they may allow the trustees to remove or at least minimise the effect of the will on the disabled person's social security benefits (see **below**). A big disadvantage of giving broad discretions is that they considerably limit what can be done if the disabled person or a friend does not believe that the trustees are acting fairly. If broad discretions are given, the choice of suitable trustees is extremely important (see **Trustees** below.)

Housing

It is obviously a matter of great concern to parents to be able to provide a good standard of housing for their disabled child on a long term basis.

If parents are in a position to leave their house to be lived in by the disabled person this can be done through a trust in the will, providing the trustees can organise suitable backup facilities. For example, if parents have a three bedroom house, it could be lived in by their disabled child and two boarders and the rent from the boarders could pay for the backup facilities. Sometimes a live-in houseparent might be necessary.

The backup facilities might be available through the Department of Health or local non-government organisations. If parents are not sure whether suitable backup facilities will be available, they can direct their trustees to investigate the situation. If the facilities prove not to be available, the trustees can then be empowered to sell the house and hold the proceeds in trust for the disabled person's benefit. Sometimes parents might be able to make an arrangement with an organisation, under which the organisation is given the use of a house in return for its promising to run the house as a group home for the disabled person and others. In this situation the trustees could be given power to terminate the arrangement if the organisation did not keep its side of the bargain.

Not too many parents would be able to leave a house in this way. However, there are ways that parents or their trustees could band together and buy a house to be occupied by the disabled child of each of them. One way this could be done is by setting up a company similar to companies that own blocks of 'company title'

home units. Each lot of trustees would own a share in the company and the share would entitle the disabled person to live in the house. After the disabled person died or moved out, the trustees would sell their share to someone else.

(2) Trustees

Selecting and replacing them

The trustees will normally be the same people as the executors named in the will. The choice of trustees is obviously very important because of the discretion that they will often be given and because of the length of time that they will have to administer the estate. Qualities to look for in trustees include:

(i) Youth, because they may have to act for decades;
(ii) Business sense, because they have to assess what will be the best investments and the effect of income tax and social security benefits;
(iii) Independence from the family situation. Trustees sometimes need to make a decision as to how property is to be divided up between the will-maker's children; and
(iv) A continuing interest in the disabled person so that they will understand her or his needs and desires and be interested enough to keep track of advances in methods of helping disabled people.

It is rarely wise to appoint the non-disabled brothers and sisters of the disabled child as the only trustees. Parents often say in their wills that what is left over when the disabled child dies should go to the non-disabled children or their families and this places the non-disabled children in a difficult situation if they are the only trustees. They know that whatever they do not spend on the disabled person, they end up getting themselves. It is normally best to have two or three trustees. They might include a non-disabled child, an accountant or solicitor or trustee company, an advocate' of the disabled person or a friend of the family who takes an interest in the disabled person.

Quite often parents do not know of anyone to appoint. It is usually then best to appoint the Public Trustee (a government body) or one of the private trustee companies. The advantages of these organisations are that they should continue to exist indefinitely and they are cautious and sensible about investing money. Their disadvantage is that they can be impersonal. A way to overcome this, at least partially, is to include in the will a direction saying that the trustee must consult with, for example, the disabled person and the people or organisations providing day to day care for them.

If one trustee dies it is normally necessary for a new one to be appointed. Parents can set out in the will how this is to be done if they wish. Otherwise the Trustee Act provides a mechanism for this.

Paying the trustee

The remuneration to be received by the trustees should be arranged with them. It may be a percentage commission, a gift of a special sum or the normal fees for an accountant or solicitor. Trustee companies usually charge a commission of 4.25% of the initial value of the estate and 5.25% of all income passing through the estate. If nothing is said in the will about remuneration, then the trustees can apply to the Supreme Court for a grant of commission.

The trustee's powers

These should be discussed carefully with your solicitor. For example, it is very important that there be power to invest in some assets which will gain in capital value. In framing powers of investment, potential housing options should particularly be considered (see **Housing** above).

(3) Appointing a Guardian

Testamentary guardians are people appointed in the will to take over the parent's role as guardians of their children. However, as with parents, their powers only apply until the child turns eighteen.

Apart from the appointment of a testamentary guardian, there is no way that a parent can appoint a guardian or the like. However, just as many parents often continue to provide informal guidance after a disabled person reaches eighteen, so there will sometimes be someone who will fill this role when the parents die. Parents can, in their wills, declare it to be their wish that a named person do so.

(4) Do Inheritances Affect Pensions and Benefits?

The invalid pension or sheltered employment allowance is affected if a disabled person receives 'income' of more than $30 a week, and fringe benefits are lost if income is higher than $60 a week. 'Supplementary assistance' for rent is affected by any non-pension income.

Quite complicated rules determine whether money used by trustees for the benefit of a disabled person is 'income' for social security benefit purposes. Basically, trustees will not affect the pension if they use money for the benefit of the disabled person rather than paying it to her or him, ***and*** they spend money 'now and then' rather than say, every week. Also, under a special rule, money paid by trustees for the pensioner's board and/or lodging is not treated as income (except for the first $1.25 per week so paid). However, this special exception does not apply to 'rent' as opposed to 'board' or 'lodging'. (It will not be rent unless you have a 'lease' rather than a 'licence'. See Chapter 5, **Housing**.) Finally, free accommodation in a trust-owned property is not income.

The above is about the ***income test***. Sometimes pensions and benefits are also reduced because of the ***assets test***. There are complex rules about whether property held in trust for a disabled person is their 'assessable asset' for social security purposes. For example, property will not count as an assessable asset unless the property itself can be used up rather than the pensioner only being entitled to the income from it. Property will count if the trustee has a discretion whether to hand it over to the pensioner or not, ***and*** the pensioner is the only person to whom it can be handed over.

The assets test is seldom relevant at present since it only affects pensions and benefits if pensioners have substantial assessable assets — $120,000 in the case of a single pensioner who does not own their

own home. However the test will become more relevant if the government reduces the $120,000 threshold or abandons its promise to increase the $120,000 with inflation.

Governments periodically change rules such as the income and assets tests. This may, of course, happen after a will-maker dies.

(5) Income Tax

Income of a trust under a will is taxable. This means that it may be better to use money to buy something which can be used by the disabled person (eg. a car or somewhere to live) rather than have it earn interest.

(6) Property not Covered by the Will

It is important to remember that not all property will be covered by a will. For example, life insurance policies and superannuation benefits often go to a person specified in the policy or to the superannuation fund. If you want these sorts of things to be covered by a trust you need to make suitable arrangements.

(7) The Orphans' Trust Fund

Some parents will be members of the Orphans' Trust Fund operated by the Challenge Foundation. This is a worthwhile fund. However, it would be a mistake to think that membership of this fund is a replacement for providing for a disabled person in a parent's will. The size of the annual subscription is low ($15) but naturally this severely limits the benefit that a disabled person might receive from the fund.

(8) Does a Solicitor Have to Draft the Will?

Where a will-maker wishes to benefit an intellectually disabled person, it is very important to have the will drawn up by a solicitor (or the Public Trustee or a trustee company if you want it as trustee).

Wills setting up trusts for intellectually disabled people are more complicated than most wills. Because of this the will-maker should check that the solicitor is familiar with this area of the law. If she or he does not have much experience in this, there is a useful article for lawyers in Chapter 12.1 of the **Lawyers Practice Manual (NSW)** (See **Further Reading**). People wishing to be referred to a private solicitor with an interest in intellectual disability can contact Redfern Legal Centre or Macquarie Legal Centre (see **Contact Points**).

(9) Can I Set Up a Trust While I Am Alive?

While they are still alive, parents sometimes open trust accounts at banks or establish investments in trust for their disabled child. However, it is normally better to set up the trust under your will. This usually leads to lower income tax being paid.

If you do want to set up a trust while you are still alive, it is best to talk to a solicitor. You need to think about the same sort of things as when you make a will.

(10) What If a Will Is Unfair?

Under the Family Provision Act a person may, in certain circumstances, ask the Supreme Court to alter the arrangements made in someone's will. An intellectually disabled person or someone on her or his behalf can do this just as anyone else can. In the court case, the intellectually disabled person is called 'the applicant'.

Whose will may the Court alter?

Usually it is the will of a parent, a spouse, a former spouse, or a de facto spouse of the applicant. But it can also be that of a grandparent or anyone whom the applicant at some time lived with, if the applicant was at some time dependant on them.

When will the Court alter a will?

The Court may alter a will where the applicant is left without adequate provision for her or his proper maintenance, education or advancement in life. What is 'adequate' depends on things such as the size of the 'estate', the money and other property of the dead person, the applicant's needs, the needs of other family members and the closeness of the relationship between the applicant and the deceased person. The Court considers what the deceased should have done as a 'wise and just' person, rather than as a 'fond and foolish' one.

What orders can the Court make?

The Court can order that the will be varied so as to make what it sees as proper provision for the applicant. The Court has a very wide discretion about the type of order to make. It may order that property be given outright to the applicant or it may appoint trustees to look after it.

When to apply?

Applications normally must be made within 18 months of the death of the person against whose estate the claim is being made. However, the Court can extend this time. If the applicant did not find out about her or his rights until after the eighteen months had expired, the Court would probably give an extension. Sometimes claims have been allowed many years after the time limit has expired. Once a person becomes aware that she or he may have a claim, however, the matter should be very promptly pursued.

Examples of Court orders

Jane is an intellectually disabled woman. Her father died and left all of his estate to Jane's brother and sister. Jane (or someone on her behalf) applies to the Court. The Court would probably order that Jane receive a share of the estate, but how big a share she would receive would depend on all of the circumstances. Sometimes she may get less than her brother and sister, sometimes more.

What if Jane's father set up a $10,000 trust fund for her but gave the rest of his $200,000 estate to Jane's brother and sister? The Court would probably order that Jane's share be increased.

Say Jane's father divided his estate equally between his three children. He appointed trustees to look after Jane's share and said that they should invest the money and use as much of the income as they see fit for Jane's benefit. Jane is capable of living in a group home but the trustees say that they will not pay any money towards this. Jane applies to the Court. The Court might then order that Jane's share be used to buy a house for her and some of her friends to live in.

(11) What Is a Beneficiary?

A 'beneficiary' is a person who receives a gift or any other benefit under a will.

What types of benefits might an intellectually disabled beneficiary receive?:

(i) A beneficiary might receive an outright gift of money or other property;

(ii) A beneficiary might be allowed to live in the family home for as long as she or he wants; or
(iii) A beneficiary might be entitled to the income earned by a 'trust fund' set up under the will.

Often trustees appointed in a will have a wide discretion about how much money they will pay to, or use for the benefit of, the intellectually disabled beneficiary.

The job of the 'executors' or 'trustees' is to deal with the deceased person's property in the manner spelt out in the will.

(12) What Rights Does a Beneficiary Have?

An intellectually disabled beneficiary has the same rights as any other beneficiary. Some important ones are discussed below.

What if a beneficiary does not receive what the will says?

She or he can apply to the Court to order the trustees to comply with the will. For example, Joe's will says that Leon, his beneficiary, may live in the family home as long as he wants to. The trustees make Leon move into an institution. Leon, with the help of his citizen advocate, applies to the Court which orders the trustees to let him move back into the house.

What if the trustees use the dead person's property for a purpose not allowed by the will?

The Court can make the trustees reimburse the 'estate' - that is, pay back the money.

What if the trustees are careless?

If the trustees are careless and money is lost, the Court can make them reimburse the estate.

How much power do the trustees have?

Even trustees who have been given a very broad discretion by the will must consider when and how they spend money for the benefit of the disabled person. If they do not act fairly, sometimes the Court can be asked to change the will. (See **What if a Will is Unfair?** above.)

What if a trustee is just no good?

If the trustees do not do their job properly, a beneficiary (or someone on her or his behalf) can ask the Court to remove them from office and appoint new trustees. One situation where the Court

might do this is if the trustees are very antagonistic towards the beneficiary and do not consider what she or he needs or what might make her or him happier.

What rights to information does a beneficiary have?

A beneficiary is entitled to know just about everything about the estate. This includes things such as what property the trustees are holding, what income the estate has received and what the trustees have spent money on. If the trustees refuse to provide this information, a beneficiary may ask the Registrar of the Probate Division of the Supreme Court to force the trustees to provide this information. If there are suspicious circumstances, a friend of an intellectually disabled beneficiary could approach the Registrar. The Registrar is concerned with seeing that estates are properly administered and she or he will investigate the matter.

(13) Wills for Intellectually Disabled People

Can an intellectually disabled person make a valid will?

Many intellectually disabled people can make a valid will (ie. one that will be legally binding). There are two basic requirements for a will to be valid:

(i) The will-maker must have 'testamentary capacity'. 'Testamentary' is an old legal word referring to the will as a 'testament'. 'Capacity' is a legal concept concerned with a person's ***understanding***. To satisfy this requirement, the person must:
   - know what a will is;
   - realise in general terms the amount and type of property she or he is disposing of; and
   - be able to weigh the 'moral claims' that she or he should be considering; and

(ii) The will-maker must know and approve of the contents of the will. There is a strong presumption that this is the case where the will has been read by or to the will-maker. Problems tend to arise where she or he does not know of ***all*** the provisions in the will or where she or he didn't understand some of them.

Even if there is doubt about whether someone is capable of making a valid will, they should still be encouraged to make the will.

Some precautions to take

To protect a disabled person's will from challenge, a number of precautions should be taken:

(i) Although it is not necessary that the will-maker understand all of the legal words and terms in the will, it is preferable that the will be uncomplicated and in plain language;

(ii) One of the witnesses to the will should be someone such as a psychologist who should satisfy her or himself that the will-maker had testamentary capacity and knew and approved of the contents of the will; and

(iii) The will should be drawn up by a solicitor experienced in will-making and, preferably, in dealing with intellectually disabled people. The solicitor will be mindful of further precautions which should be taken. The solicitor should keep comprehensive notes.

What happens if a disabled person dies without a will?

If an intellectually disabled person dies with no will or with an invalid will, the 'intestacy' (no will) laws will apply. Under these laws the disabled person's property will go to the person's next of kin, basically in the following order:

(i) spouse
(ii) children
(iii) parents
(iv) brothers and sisters
(v) grandparents
(vi) uncles and aunts.

If there is no spouse and no relatives, the property goes to the State Government. However, the Government can then give some or all of the property to people for whom the deceased might have been expected to provide for, if she or he had made a valid will.

CRIME AND THE INTELLECTUALLY DISABLED

Intellectually disabled people are especially vulnerable under the criminal legal system. Disabled people and their friends and families should all be aware, however, that the criminal legal system provides particular protections, especially for those who have been accused of a crime.

(1) Commonly Asked Questions

How do you know if you are being arrested?

If you are being arrested you must be told so or have the fact communicated to you in some other way (for example, by being told that you may not leave). You should also be told the reason for your arrest. Unless you have been arrested, you do not have to go with the police (but if they insist, don't struggle, just tell your lawyer about it later).

Is there a 'right' to silence?

Whether you have been arrested or not, ***you do not have to say anything***. The only exceptions are in traffic offences, where you must give your name, address and details of the car if you are driving, and in certain drug offences. It is normally sensible to give the police your name and address but answering any other police question can be dangerous. You should always speak to an independent lawyer before answering other questions.

Is there a right to legal advice?

There is no legal right to be allowed legal advice but the Police Commissioner's Instructions (see **below**) state that generally the police should allow you to contact a lawyer before you are questioned.

Is there a right to bail?

'Bail' is being allowed out of police custody after promising to attend court. Once you are arrested, a police sergeant at the station ***may*** give you bail. If the police will not give you bail you will be held at the station and ***must*** be taken to a court as soon as possible. This may not be until the next morning. Bail may be granted by the court.

There is a ***presumption*** in favour of bail for most offences. This means that the court ***presumes*** bail should be granted and the police

must convince the court that you shouldn't get it. Bail ***will*** be granted for most offences. There are set ways of deciding if someone should get bail, including looking at the likelihood of the accused appearing at court, the interests of the accused and the protection and welfare of the community. Bail can be granted with or without conditions, eg. you may be granted bail on the condition that you do not contact any witnesses in the case.

(2) Being a Witness

Disabled people can give evidence in court as long as they generally understand that they have promised to tell the truth (and what that means) and that telling a lie is against the law.

(3) Victims of Crime

An intellectually disabled person who is the victim of a crime has the ***same rights*** to the protection and assistance of the law as any other person, but often it does not work this way. There are some understandable reasons for this (eg. the victim is perhaps less likely to complain and probably less likely to be believed).

Even where an intellectually disabled person does contact the police, or someone else does on their behalf, the police may decide not to prosecute because they feel that the disabled person will not be a reliable witness. The police are often not good judges of this and if you feel they have made an unreasonable decision you should complain to the Commissioner of Police or the Ombudsman, or both (see **Contact Points**).

The law in N.S.W. provides for both the punishment of the offender and the payment of compensation (up to $20,000) to the victim of a crime. This maximum amount is normally only awarded to the victims of very serious crimes (eg. sexual assault). Victims of crime should ask a solicitor to make an application for compensation on their behalf. (See **The Law Handbook** for more details).

(4) If You Are Accused of a Crime

Intellectually disabled people accused of committing crimes are particularly vulnerable because their special needs are often not met and because the legal system tends to discriminate against the less articulate, just as it discriminates against the less wealthy. It is particularly important, therefore, to get good legal representation (see **Legal Representation** below).

(5) Defences to Crimes

A person who commits a crime is excused if she or he can prove that she or he has a complete legal defence. Some intellectually disabled people are 'insane' in the eyes of the law. 'Insanity' is a complete defence and if it can be proved, the person accused will not be found guilty of the crime.

However, someone who is found to be insane will be detained 'at the Governor's pleasure' in an institution. She or he is released when the Government chooses. These people often spend longer in an institution than people found guilty and sentenced to jail. For this reason the insanity defence is seldom used.

Some defences reduce the particular charge. One such defence is 'diminished responsibility' which reduces a murder charge to manslaughter. This defence is of limited practical importance as the maximum penalties for murder and manslaughter are the same in N.S.W.

(6) Police

The first contact an accused person has with the criminal legal system is usually with the police. With minor offences the police may use their discretion and give a warning rather than charge someone, and they may decide to take the person home or to somewhere to stay rather than lock her or him up.

Police attitudes to the accused are going to be affected by their awareness — or not — that the person is disabled. This goes back to police training. At the moment, police in NSW receive only a few hours training in regard to 'mentally disturbed' people and most of this is with reference to the Mental Health Act and mentally ill people.

(7) Confessions

It is easy to be intimidated when being questioned by the police, particularly if you are alone at the police station.

In more than 90% of the more serious criminal cases, police rely to some extent on alleged confessions by people accused of the crime. Some of the confessions were made by people because of threats, or promises, or just because of fear and confusion. Some were made up by the police. Intellectually disabled people sometimes 'confess' to crimes they have not committed in order to please police officers or other authority figures. It is particularly important that intellectually disabled people are accompanied and assisted at this early stage by a sympathetic friend, relative or care giver.

According to the law, a judge or a magistrate ***cannot*** allow the police to use in court a 'confession' made by an accused person, if the police ***induced*** the confession by telling lies or threatening or holding out promises to an accused person. Such a confession is said to be 'involuntary'.

Even if the judge or magistrate decides that the confession is voluntary they have a discretion to say that it cannot be used. This discretion may be exercised where using the confession would be unfair to the accused or when the police obtained the confession by illegal or unfair means (eg. an illegal phone tap). It should be noted that some police conduct may be so unfair or illegal that it makes a confession 'involuntary' (see **above**).

When deciding whether to exercise its discretion to stop the police using a confession, the court must take into account all the relevant circumstances, including the state of the accused's mind and body when the confession was made. The fact that a person is intellectually disabled would be an important factor for the court to consider.

In many cases, the extent of the disability would strongly influence the court to say that the confession could not be used.

Another factor for the court to consider in deciding whether to exercise its discretion is police compliance with the ***Police Commissioner's Instructions***.

These instructions are meant to be guidelines for the police to use when questioning a suspect. The police are not legally bound to follow them, but if they don't, the court may exercise its discretion to say that a confession cannot be used.

Some of these instructions are particularly relevant to intellectually disabled people. For example, instruction 7(3) says that the police should attempt to have a parent, guardian, friend or other responsible person present if they suspect that the person they are questioning is of 'feeble understanding' (presumably this includes most intellectually disabled people). Instruction 7(4) states that a person who wishes to consult a lawyer before being questioned should be given every opportunity to do so. Instruction 6(3) states that special steps should be taken to ensure that an intellectually disabled person or a person who does not understand English is treated fairly.

If the police do not comply with these guidelines a complaint should be made to the Police Commissioner and/or the Ombudsman. (See **Contact Points**.)

Anybody who is present with a disabled person at a police interview should tell the disabled person that she or he ***should not answer any questions*** without first seeking independent legal advice.

(8) Going to Court

When a person is accused of a crime the trial is often delayed if the person does not have 'legal capacity'.

As the law presently stands, a case can be postponed indefinitely if the accused person is 'unfit to plead' or 'unfit to stand trial'. There is little difference between these difficult legal concepts. A disabled accused person who does not understand that she or he must promise to tell the truth to the court (and what that means) and/or is incapable of understanding the general nature of the charge made against them may be said to be 'unfit' and detained indefinitely in a mental hospital or jail.

Sweeping changes to this area of the law have been drafted by the N.S.W. Government. These changes are contained in the Crimes (Mental Disorder) Amendment Act, 1983 which should come into force in mid 1986. This Act abolishes the technical legal distinction between someone who is 'unfit to plead' and/or 'unfit to be tried' and deals only with the question of whether someone is 'fit to be tried'.

On minor criminal matters (i.e., those in the Local Courts), if it appears to the magistrate that the accused person is developmentally disabled (but not mentally ill) and that it would be more appropriate to deal with the person outside the usual criminal system, the new Act will give the magistrate wide powers to:

(i) Dismiss the charge and let the accused person go free;
(ii) Dismiss the charge and release the accused person into the care of a responsible person;
(iii) Dismiss the charge upon the condition that the accused person attends a specified place for examination of their mental condition or for treatment; and
(iv) Make any other order the magistrate thinks is appropriate.

These are obviously very wide powers and, if properly used, would ensure disabled people were usually kept out of the prison system for minor offences.

In more serious criminal cases (in the District Court or Supreme Court) there is a much more complicated procedure set up by the new Act.

Any party to the proceedings (or the judge) can raise the question of the accused person's fitness to be tried at any stage.

Once the question is raised, there is a separate hearing by a jury to decide whether the accused person is fit to be tried. The jury would usually decide on the basis of expert evidence put before it.

If the person is found fit to be tried, the original criminal trial will re-commence.

If the person is found unfit to be tried, she or he will be referred to the Mental Health Review Tribunal which will determine whether the person is likely to become fit to be tried during the next twelve months.

If the Tribunal finds that the person will become fit to be tried in the next twelve months, the Court may grant the accused person bail or order that they be detained in a mental hospital (or other place) for up to twelve months.

Most intellectually disabled people who are not fit to be tried are unlikely to become so in a twelve month period. If the Tribunal decides that an accused person will not become fit to be tried during the next twelve months, the Attorney General may step in and order the release of that person. If the Attorney General decides not to step in, the Court will conduct a special hearing to determine whether the 'unfit' person committed the crime.

If this special hearing (which is really a 'qualified' trial) finds the accused not guilty, she or he will be free to go.

If the special hearing makes a finding of guilty, the Court has to indicate approximately how long a 'sentence' it would have imposed if it had been a normal trial. The disabled person will then be detained for that period, usually in jail.

(9) Alternatives to Imprisonment

It is important to realise that even when an intellectually disabled person has been convicted of a serious offence, there are alternatives to imprisonment.

A solicitor who is aware of the person's disability should attempt to establish the person's ability and willingness to comply with any conditions which might be imposed if she or he is placed, for example, on a good behaviour bond.

Awareness of the training programmes and support services available in the community is very important here. While it is hoped that court officials will acquaint themselves with this information, it is ultimately up to the solicitor, with the help of relatives and friends, to acquaint the magistrate or judge with what support is available for the particular offender.

(10) Legal Representation

It is very important that an intellectually disabled person accused of a crime sees a solicitor as early as possible. Normally they will be eligible for free representation through the Australian Legal Aid Office or the Legal Aid Commission (see **Contact Points**.) Advice

and referral to a solicitor can also be obtained from Redfern and Macquarie Legal Centres. (See **Contact Points**.)

The solicitor should be made aware of the accused's intellectual disability and of things such as training programmes that the accused could undertake. The solicitor might then be able to persuade the police not to proceed with the matter or be able to place before the Court more suitable sentencing options than the accused going to prison. Solicitors seldom know much about intellectual disability so relatives and friends of a disabled person should not hesitate to advise them.

(11) Educating the Police and Courts

One of the most important ways of protecting the interests of intellectually disabled people in the criminal legal system is to educate the police and the courts to ***recognise*** and deal appropriately with disabled people. This involves lobby groups for disabled people pressuring the police and the government to institute programmes to alert police, and others in the criminal legal system, to the special vulnerability and needs of disabled people.

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CONSUMER PROTECTION

This chapter sets out a number of ways in which the law may especially help an intellectually disabled person who is involved in an unfavourable *consumer transaction or gift.* **A consumer transaction may involve buying, hiring or selling property or services or , borrowing or lending money. More than one form of assistance may be available for a particular problem and there are many ways, not set out here, by which the law can assist anybody with a consumer problem or dispute (for more information see Redfern Legal Centre's** Law Handbook.)

Legal aid will normally be available for disabled people who want to protect their rights as consumers by court action (for more information see the Chapter **Protecting Your Rights).**

Consumer transactions almost always involve a contract, so that the basic law affecting consumers is contract law. Contract law consists of common law and legislation. The ***common law*** is a set of rules developed over the years by judges dealing with actual cases, while ***legislation*** is law made by parliament.

(1) What Is a Contract?

A contract is an agreement that is legally binding, ie. it can be enforced by the courts at the instigation of one party if the other fails to keep their part of the agreement. A contract is usually made by an exchange of promises, though sometimes people do not actually agree on all the things that will be in a contract. In that case the court pretends that people have thought about possible problems and agreed about who will be responsible for any loss. The court 'implies' into contracts the promises which it thinks the people would have made, had they thought about it.

People enter contracts every day: if you buy a banana, you make a contract with the shopkeeper; buying a cinema ticket involves making a contract with the owners of the cinema. An agreement to live somewhere and pay money to do so is a contract and so is an agreement to do work in return for food and board.

(2) Must a Contract Be In Writing?

A contract does ***not*** usually have to be in writing. It can be a spoken exchange of promises; sometimes its words are not even spoken, for example when you pay the cashier at a supermarket for the things you have bought. Some contracts, however, must be in writing. These include agreements to buy or sell land, and hire purchase agreements. Even where the law doesn't ***require*** you to

put the agreement into writing, if the transaction is complicated or very important, it is often a good idea to do so. Then both sides know exactly what they are agreeing to.

(3) Who can Make a Contract or Gift?

If an intellectually disabled person makes a contract or gift without proper understanding of what they are doing, the transaction ***may*** be invalid. This is because the person lacked the necessary ***legal capacity*** to make the transaction.

Where a person lacks general understanding of the nature and effect of a contract or gift, the law calls this ***incapacity***. In deciding whether a particular transaction is affected by incapacity, a number of rules apply. These are:

(i) The fact that a person lacks capacity for one transaction does not mean that they lack capacity for all transactions, eg. they may be able to understand buying a carton of milk but not leasing a house;

(ii) In each case, one must look at the nature of the transaction and the value of the property involved. The more complicated the transaction and the higher the value of the property, the greater the understanding required;

(iii) The person does not need to understand the technical legal language in a contract. It is enough to understand the general nature and effect of the transaction. For example, in the sale of a house the person would need to understand that they owned the house and that they were selling it for a reasonable price to another person.

(4) The Legal Effect of Incapacity

A person does not need legal capacity to purchase ***necessaries*** provided that only a reasonable price is paid. ***Necessaries*** are things people need for ordinary, everyday use, such as food, clothing, medical treatment and rent.

Any other type of contract will not be binding on a disabled person and may be overturned by that person, or someone acting on their behalf, if:

(i) The person lacked capacity for the transaction;
(ii) The other person involved realised or ought to have realised that the person lacked capacity;
(iii) The disabled person can give back at least most of the benefits she or he has received under the contract. If the contract was for the purchase of a television, for example, it is necessary that the television can be given back in much the same condition as when it was purchased; and
(iv) The other person has not sold the property that the disabled person wants back to someone else who is not aware of the disabled person's incapacity.

Note that a disabled person cannot escape a contract unless all of the factors in ***(i) to (iv)*** apply. Incapacity alone is not enough.

On the other hand, for a ***gift*** to be overturned, ***only (i) and (iv)*** need apply.

(5) Misleading Statements

Sometimes a disabled person will enter a contract because or partly because of an untrue or misleading statement. This is called a misrepresentation. Sometimes a misrepresentation is ***fraudulent***, that is, intentionally false or made without caring whether or not it is false. For example, if a sales person knows that what she or he is saying is not true, a consumer will normally be able to overturn the contract and sue the salesperson or their employer for any loss they have suffered.

In other cases a misrepresentation can be made innocently, eg. a salesperson may really think that a particular fact about, say, a car is true and the salesperson may have some reasonable basis for thinking so. With an innocent misrepresentation the contract can normally still be overturned but the disabled person cannot sue to recover any loss.

(6) Undue Influence

With certain types of dependent relationships where one party might take advantage of the other, the law ***presumes*** that property given or sold by one person to the other is affected by what is called 'undue influence'. Any person in such a relationship who receives property by gift or sale can be forced to actually ***prove*** that she or he did not ***unduly influence*** the other person to make the gift or sale. If the matter is later taken to court and the receiver of the property cannot prove an ***absence*** of undue influence, the court can overturn the transaction.

The most important relationships where the law makes this presumption are those between doctor and patient, guardian and child, solicitor and client, and minister and churchgoer.

In other cases where there is a close and confidential relationship between people (eg. a disabled person and a care giver) a disabled person — or someone acting on her or his behalf — may be able to ***prove*** that she or he was unduly influenced to make a gift or sell property for a low amount. If she or he is able to prove this, the other person must give back the property.

(7) Unfair Contracts

Sometimes one party to a contract is much less able to look after her or his interests than the other party and is persuaded into an unfavourable transaction. The law says that such 'bargains' are 'unconscionable' (very unfair) and a court will overturn an unconscionable bargain and make the stronger party return any property they have gained to the person they have taken it from.

Often, disabled people will be in an extremely weak bargaining position and may ask a court to overturn the bargain because it is unconscionable.

(8) Gifts

The law generally looks at gifts more suspiciously than contracts involving a purchase at a fair market price. It will usually be easier to convince a court to overturn a gift. If a disabled person lacks capacity to understand the nature and effect of a gift ***and*** the person who has received the property has not sold it to an innocent third party, the disabled person (or someone on their behalf) could recover the property. (See **the Legal Effect of Incapacity** above.)

(9) Consumer Protection Legislation

Because the common law' does not provide adequate protection for consumers, Parliament has passed laws which deal with disputes about contracts. Two Acts which are particularly important to people with intellectual disabilities are the Contracts Review Act 1980 and the Credit Act 1984.

Unjust contracts

Under the Contracts Review Act the Supreme and District Courts can overturn or change a contract which is 'unjust'.

The Act says that the meaning of 'unjust' includes 'unconscionable', 'harsh' or 'oppressive'. In deciding whether a contract is unjust the court looks at all of the circumstances including:

(i) Whether one party was in a much stronger bargaining position than the other party;
(ii) Whether a party was not properly able to protect her or his interests because of intellectual disability;
(iii) The education levels and literacy of the parties; and
(iv) How difficult the terms of the contract are to understand.

If the court intervenes, it has wide powers. It can, for example, alter the terms of the contract, order that the contract be overturned or order that money be repaid.

The Contracts Review Act allows the courts to intervene in many situations where the law previously provided no solution to a problem. However, the Act has two important limitations:

(i) It does not apply to business contracts eg. it would not apply to a contract to sell fruit made by a disabled person who operated a fruit barrow as a business; and

(ii) Quite a lot of money normally needs to be involved before it is worth the expense of going to either the District or Supreme Court. These are the most important courts and therefore the most expensive.

Unjust credit contracts

A credit contract is an agreement to borrow or lend money. The Credit Act deals with most credit contracts made by people whose business it is to lend money (eg. banks, finance companies, money lenders etc.) involving less than $20,000.

The Act gives the Commercial Tribunal similar powers as the courts have under the Contracts Review Act. The Tribunal can intervene when a credit contract is 'unjust'. The Act says that a contract is 'unjust' if it is 'unconscionable, harsh or oppressive'. This definition gives the Tribunal a very wide discretion to decide whether a particular contract is fair to both sides.

The Tribunal looks at factors similar to those under the Contracts Review Act in deciding whether a particular contract is unjust. If the Tribunal decides that a credit contract is unjust it has a wide range of powers to put right the injustice.

For example, if an intellectually disabled person buys a car with a loan at a very high interest rate, that person may have been taken advantage of by a salesperson. The Commercial Tribunal might decide that the loan contract is unjust and vary it by reducing the interest rate. On the other hand, the Tribunal might decide to cancel the contract and order the finance company to take the car back and return all of the money to the disabled person.

(10) Ways of Exercising Rights

Going to court (or negotiating before or after threatening to go to court) is one way to exercise your rights. However, other ways are often cheaper and far more effective than court cases. These other ways include:

Using the media

Current affairs shows are often keen to expose consumer rip-offs, especially where someone such as an intellectually disabled

person has been taken advantage of. However, care should be taken in deciding to use the media as they sometimes take advantage of you too.

Complain to the Department of Consumer Affairs

The NSW Department of Consumer Affairs will investigate complaints about fraudulent or unfair commercial practices. The Department cannot ***force*** a trader to do anything. However, most business people do not wish to be off-side with the Department and will often do what they suggest. (See **Contact Points**.)

Complain to the Consumer Claims Tribunal

This Tribunal can deal with a dispute involving a contract between a consumer and a trader for the supply of goods or services, eg. where a person has bought a washing machine which does not work properly or where a person has their car repaired but is not happy with the quality of the work.

The Tribunal can only deal with disputes involving less than $1,500. It can order that money be repaid or cease to be owing or it may order that work be carried out.

After a 'claim form' is lodged with the Tribunal a date is set for the hearing of the claim. On that day a referee will try to negotiate a compromise with the parties. If a compromise cannot be reached the referee will look at the facts that have been presented and make a decision.

The procedure for giving evidence is less formal than in a court. People must normally present their own case to the Tribunal (unlike a court where a lawyer will usually represent you). The present Act which gives the Tribunal its powers is worded so that it is unlikely that a disabled person would be allowed representation. This defect in the Act seems to be more an oversight than a deliberate policy to exclude disabled people. (For the address and phone number of the Tribunal, see **Contact Points**.)

CARE GIVERS

'Care givers' are people who have regular dealings with disabled people in a 'professional' capacity. Supervisors at sheltered workshops and activity therapy centres, staff at residentials or nursing homes and other disability 'professionals' are all included.

Care givers are often unsure about ***their*** rights and obligations — how much 'care' must they exercise in helping to look after someone? Will they be liable if someone is injured while in their 'care'?

This chapter attempts to help care givers to understand their rights and obligations in this field.

It should be noted that there is probably no difference between the rights and obligations of a care giver who is a 'volunteer' and those of a paid employee.

There is ***no*** difference, in terms of legal rights and liabilities, between people employed by the Federal or State Governments and people employed by private organisations.

We are dealing here ***only*** with the possibility of care givers being sued in 'civil actions'. A civil action is a court case where a person sues another person for 'damages', ie. monetary compensation. The other type of court case is a 'criminal action'. If someone is found guilty in a criminal action, they may be jailed or have to pay a fine to the government. In a civil action the ***standard of proof*** ie. the degree to which the person who complains must satisfy the magistrate, judge or jury, is ***lower*** than in a criminal case. The civil standard of proof is 'on the balance of probabilities'. The criminal standard is 'beyond reasonable doubt'.

A disabled person either brings a civil action in their own name or, if necessary, a relative or friend can sue on her or his behalf. When someone is charged with a crime, she or he is usually charged by the police. The same set of facts, eg. an assault, can give rise to both civil and criminal actions.

(1) Physical Interference — When Is It Unlawful?

The legal rights of disabled people to live free from physical force, intimidation, coercion and imprisonment are the same as for all other people. Interference with this general 'right to freedom' may be unlawful and may give rise to liability to be sued. Set out below are actions by care givers which are unlawful unless one of the 'defences' set out in **Physical Interference — When Is It Legal?** (below) applies to the situation.

Assault and Battery

'Battery' is committed by intentionally bringing about a harmful or offensive contact with another person, eg. hitting or kicking someone. To commit battery, immediate physical contact is not necessary. For instance, a care giver who pulls a chair from underneath a disabled person commits battery. The person need not even be conscious of the interference at the time of the battery. A care giver, for example, who takes a blood sample from a sleeping disabled person commits a battery.

'Assault' is an act intended to arouse fear of a battery. A care giver, for example, who points a knife at a disabled person intending to arouse fear that it will be used, commits an assault.

Wrongful Imprisonment

Wrongful imprisonment (also called false imprisonment) is the intentional confinement of a person in a particular place, eg. locking a person in a room or saying that if a person tries to leave the room she or he will be stopped. A disabled person need ***not*** even know that she or he has been locked in for the wrong to be committed. Accordingly, a care giver who locks the bedroom door of a sleeping disabled person commits a wrongful imprisonment.

(2) Physical Interference — When Is It Legal?

Consent

Where a disabled person ***freely*** gives ***informed consent*** to an assault, battery or imprisonment, the care giver will not be liable. There is a 'valid consent'. The requirement that a consent be 'freely' given means that it cannot be obtained by misleading the person or by threat of force. The consent must be to the particular act eg. a consent to a 50 millilitre blood sample does not justify a 500 millilitre sample.

The issue of consent commonly arises in relation to medical treatment of intellectually disabled people. The following rules apply:

(i) A medical treatment may be a battery unless there is a valid consent or unless the situation is an emergency.

(ii) For an intellectually disabled person to give a valid consent, they must have an understanding of the nature and effect of the proposed treatment. The consent is then 'informed consent'. A particular person may be able to consent to a simple treatment but not something more complicated such as a sterilization. Health professionals may not proceed without the informed consent of the patient or someone entitled to consent on the patient's behalf.

(iii) If a child is under 14, the child's guardian (normally, of course, her or his parent) consents for the child. If the child is 14 or 15, the guardian can consent and so can the child if she or he has the necessary understanding. If the child is 16 or 17 and has the necessary understanding, only the child can consent. Otherwise the guardian can probably consent.

(iv) Once a person is 18, only she or he can consent unless she or he has a guardian or is specially made a ward of court. Most intellectually disabled adults do not have guardians which causes problems in obtaining a valid consent. See Chapter 6, **Guardianship and Money Management**.

(v) It appears that guardians can only consent to 'therapeutic' treatments, i.e., treatments which are required to treat a medical condition. For example, a sterilisation will not be therapeutic if it is carried out for contraceptive reasons.

(vi) Where no one can consent to a procedure, the Supreme Court can probably give consent.

Self defence

A person may use ***reasonable force*** to defend her or himself from attack. What force will be reasonable depends on the nature of the attack. A care giver who is being punched may be justified in punching and wrestling with a disabled person to subdue the attack. If the particular disabled person has a history of violence, the care giver may be justified in using greater force. The weapons used by the attacker (eg. a knife) are relevant in deciding what an appropriate response would be. The reaction must be ***reasonable*** in ***all*** the particular circumstances.

A person may also use reasonable force in coming to the defence of a third person. If a disabled person attacks another disabled person, a care giver would be justified in intervening in the defence of the third person.

Reasonable discipline

A parent or a person standing in the position of a parent (eg. the administrator of a residential facility) can enforce reasonable discipline against a child (by physical force or confinement). The force used must not be excessive. A guardian of an adult intellectually disabled person may have a similar power to control that disabled adult.

Necessity

A care giver may restrain a disabled person if it is clearly necessary in order to avert an imminent danger. The danger must seriously threaten the disabled person or another person or their property. For example, a care giver would be justified in restraining a disabled person who was about to walk in front of a moving car. Similarly, a care giver in a sheltered workshop would be justified in restraining a person who intended to put her or his hand in dangerous machinery.

(3) Is the Law Too Restrictive?

All care givers have probably done things for which they could be sued under the above rules. If, for example, a disabled person is locked in a room in a 'time-out' behaviour management programme, this would be wrongful imprisonment. If a care giver physically restrains a disabled person from picking at a sore, this may be battery. There would also be many grey situations where it would be unclear whether they were acting lawfully or not.

In practical terms, it is unlikely that a care giver will be sued if their actions are reasonable. However, care givers who are acting reasonably in the interests of disabled people should not have to risk being sued. Also, care givers will of course differ in their assessments of what is 'reasonable'. Some do not act reasonably. In Victoria, a government committee has recommended that special laws be passed dealing with the use of 'restraint' and 'seclusion' (eg. a locked room) on intellectually disabled people. These laws would make restraint and seclusion legal, subject to strict procedural safeguards to ensure that their use is not abused. (See **Report of the Committee on a Legislative Framework for Services to Intellectually Disabled Persons**, pages 185-193). It would be sensible for New South Wales to adopt laws like these.

The law relating to consent is also unsatisfactory because it does not allow anyone to consent to medical treatment for an adult who cannot consent for her or himself and who does not have a guardian. For a possible way of changing the law to overcome this problem see Chapter 6, **Guardianship and Money Management for Adults**.

(4) Negligence

Negligence is failing to take ***reasonable care*** to avoid injury to another person or damage to her or his property. The victim of negligence can sue for damages. If, for example, a care giver does not look where they are going when pushing a disabled person in a wheelchair and there is an accident in which the disabled person is injured, the person could sue for damages.

The law thus imposes a 'duty of care' in relation to people around us. Care givers usually owe a duty of care to disabled people with whom they deal. Perhaps the most important question for care givers concerns the precise requirements of that duty, ie. what is a reasonable duty of care for a care giver?

This question is easiest to answer in relation to care givers with special training such as nurses. People with special training must exercise the professional level of care that such people exercise. Nurses must be as careful as a nurse usually is. Likewise with a social worker or psychologist. It is harder to define the level of care required from a care giver who does not have special training. It may be that an untrained care giver has to give a level of care only marginally higher than would be given in the particular situation by any ordinary reasonable member of the community. As ordinary care givers become better trained, the level of care required of them will become higher.

Following are some examples of situations in which care givers commonly find themselves:

Administering medication

Even when a care giver has no medical training, she or he may be liable for incorrectly administering medication in one of two ways. First, if the administration of the medication is simple, a ***reasonable*** person would take care to administer the correct amount or they may be liable. Secondly, if the administration is complex, a reasonable person might ensure that a doctor or some other medically qualified person administered the medication. It may be, however, that in an emergency, a care giver would be acting reasonably in attempting to administer the medication. A care giver may also be acting reasonably if she or he obeys a direction from a supervisor or a higher authority that a doctor is not needed, although the authority may then be liable.

Helping a disabled person to bathe

If the care giver didn't check the water temperature, she or he could be liable to a disabled person who was badly scalded. If the care giver placed a disabled person in an extremely hot bath, the care giver could be liable for damage caused to the disabled person by a heart attack, even though the disabled person had an abnormally weak heart.

(5) Preventing Harm to Others

A care giver may know that a particular disabled person, if allowed to go shopping on their own, is likely to cause damage to the property of shop owners. Does the care giver owe a 'duty of care' to the shop owner to prevent the disabled person from going shopping on her or his own?

A similar question is whether care givers have a 'duty of care' to stop intellectually disabled people from inflicting harm on themselves.

In these situations, care givers do have a duty to take all reasonable steps short of actions that would amount to assault, battery or wrongful imprisonment (see **above**). In the above example, the care giver should try to avoid the damage to the shop by warning the shopkeeper or persuading the disabled person not to go shopping. Similarly, if a disabled person has a tendency to bite passers-by, care givers have a duty to prevent this from happening by providing adequate supervision or by planning activities in a way that will avoid the danger.

Sometimes care givers can only prevent damage by 'physical control' amounting to assault, battery or wrongful imprisonment. Unless the care giver would have a good defence if sued for these things, they can hardly have a duty to use physical restraint to stop damage occurring. See **Physical Interference — When Is It Legal?** above. If the care giver does have a good defence, there ***may be*** a duty to use physical control, for example:

(i) If a disabled person attacks a stranger, a care giver is ***allowed*** to use reasonable force to restrain them. (See **Self Defence** above.) Whether the care giver has a ***duty*** to use force however, may depend on factors such as the likelihood that the care giver would themselves be harmed by the disabled person if they interfere.

(ii) A parent has a special duty to guard the interests of a child. Hence if the parent's power of reasonable discipline would give a good defence (see **above**) the parent will probably have a duty to exercise physical control.

(iii) In a situation of ***imminent danger*** such as where a disabled person is about to walk in front of a car, it may be that the care giver would have a duty both to the disabled person and to people in the car to restrain the disabled person. (See **Necessity** above).

It should be emphasised that a care giver will not be liable just because a disabled person injures her or himself or someone else, even if the care giver did have the right to use physical control. Before anyone can be liable for negligence, including failing to control a disabled person, injury or damage must have been 'reasonably foreseeable' and the care giver must have failed to take 'reasonable care' to avoid the injury or damage. Further, in deciding what is 'reasonable care', a court may take into account the benefits to the community of disabled people being encouraged to live as normally as possible. Integration of intellectually disabled people into the community naturally involves risks of injuries to disabled people and others. However, these risks can be minimised if the implementation of the Richmond Report is sufficiently funded to ensure that disabled people moving into the community receive such training and supervision as they may need.

(6) Who Pays for Wrongs?

Once liability to pay damages has been established and the amount decided, the important question is, who pays?

The general principle is that people are responsible for their own civil wrongs. However, an ***employer*** is normally also liable for the wrongs committed by her or his employees in the ordinary course of carrying on their jobs. Most care givers will be employees.

If only the employer is sued then that person or organisation will have to pay all the damages. If both the employer and the employee are sued, the court may divide the liability for damages between them. If only the employee is sued, they can have the employer made a party in the case and again the court may divide the liability for damages between them.

Often only the employer would be sued. Employers will sometimes pay damages for which their employees are liable, whether they have to or not. Care givers, however, may find themselves having to personally pay damages unless their employer has adequate insurance covering employer ***and*** employee. Employees should insist that such insurance is a term of their employment.

CONTACT POINTS

1. ***Anti-Discrimination Board***
   8 Bent St
   Sydney, N.S.W. 2000
   Phone: (02)231 0922

2. ***Australian Council for Rehabilitation of the Disabled***
   55 Cowle St.
   Ryde, N.S.W.
   Phone: (02)80 4488

3. ***Australian Legal Aid Office***
   Daking House, Rawson Place,
   Sydney, N.S.W., 2000
   Phone: (02)219 5000
   (Head Office. For branches, see Commonwealth Government Section of telephone directory).

4. ***Commissioner of Police***
   14 College St.
   Sydney, N.S.W. 2000
   Phone: (02) 20 966

5. ***Consumer Claims Tribunal***
   16 Wentworth Ave.
   Sydney, N.S.W. 2000
   Phone: (02) 266 8111

6. ***Department of Community Services***
   Disability Services Section
   117 Clarence St.
   Sydney, N.S.W. 2000
   Phone: (02) 230 0811

7. ***Department of Consumer Affairs***
   1 Oxford St.
   Darlinghurst, N.S.W. 2010
   Phone: (02) 266 8111

8. ***Disabled Peoples International***
397 Lyons Rd.
Five Dock, N.S.W. 2046
Phone: (02) 713 8998

9. ***Family Planning Association of New South Wales***
161 Broadway
Broadway, N.S.W. 2007
Phone: (02) 211 0244
(Head Office. For branches, see telephone directory.)

10. ***Health Department Complaints Unit***
McKell Building,
Rawson Pl.
Sydney, N.S.W. 2000
Phone: (02) 217 6666

11. ***Law Society of New South Wales***
170 Phillip St.
Sydney, N.S.W. 2000
Phone: (02) 232 2511

12. ***Legal Aid Commission***
Daking House
Rawson Place
Sydney, N.S.W. 2000
Phone: (02) 219 5711
(Head Office. For branches, see N.S.W. Government section of telephone directory.)

13. ***Macquarie Legal Centre***
48-50 D'Arcy St.
Parramatta, N.S.W. 2150
Phone: (02) 689 1777
(Intellectual disability legal advice service one Tuesday each month from 6:30 p.m. to 8:30 p.m..Emergency advice at other times.)

14. ***Medical Board of N.S. W.***
McKell Building
Rawson Pl
Sydney, N.S.W. 2000
Phone: (02) 217 6666

15. ***N.S.W. Council for Intellectual Disability***
4 Doig Ave.
Denistone East, N.S.W. 2112
Phone: (02) 807 1411

16. ***Ombudsman, Commonwealth***
227 Elizabeth St.
Sydney, N.S.W. 2000
Phone: (02) 264 7188

17. ***Ombudsman, N.S.W.***
175 Pitt St.
Sydney, N.S.W. 2000
Phone: (02) 235 4000

18. ***Privacy Committee***
Goodsell Bldg
8 Chifley Sq
Sydney, N.S.W. 2000
Phone: (02) 238 7713

19. ***Protective Office***
491 Kent St.
Sydney, N.S.W. 2000
Phone: (02) 265 3131

20. ***Redfern Legal Centre***
73 Pitt St.
Redfern, N.S.W. 2016
Phone: (02) 698 7277
Intellectual Disability Rights Service (Friday evenings 6:00 p.m. to 9:00p.m. and Monday to Friday 9:00 a.m. to 5:00 p.m.

21. ***Youth and Community Services***
Licensing Branch
323 Castlereagh St.,
Sydney, N.S.W., 2000
Phone: (02) 217 7534

CITIZEN ADVOCACY PROGRAMMES

1. ***Citizen Advocacy N.S.W.***
   7/70 Macquarie St.
   Parramatta, N.S.W. 2150
   Phone: (02) 635 5810

2. ***Citizen Advocacy Northside***
   24 Olga St.
   Chatswood, N.S.W. 2067
   Phone: (02) 411 1599

3. ***Citizen Advocacy Northwest Programme***
   Shop 15, Southgate Shopping Complex
   South Tamworth, N.S.W. 2340
   Phone: (067) 65 3752

4. ***Newell Citizen Advocacy Programme***
   8 Doyle St.
   Narrabri, N.S.W. 2390
   Phone: (067) 92 3195

5. ***Wescap***
   70 Macquarie St.
   Parramatta, N.S.W. 2150
   Phone: (02) 689 2206

FURTHER READING

Robin Creyke and Phillipa Weeks, **Duty of Care — Law and the Direct Care Worker** (Shield Press 1985)

Susan Hayes and Robert Hayes, **Mental Retardation : Law, Policy and Administration** (Law Book Company 1982)

Susan Hayes and Robert Hayes, **Simply Criminal** (Law Book Co. 1984)

Redfern Legal Centre, **The Law Handbook**, 2nd edition, (Redfern Legal Centre Publishing 1986)

Redfern Legal Centre, **Lawyers Practice Manual (NSW)**, Chapter 12.1 (Law Book Co., loose leaf)

Report of the Committee on a Legislative Framework for Services to Intellectually Disabled Persons (Victorian Government Printer 1984).

People with intellectual disabilities often have their rights violated. These violations also often go unrecognised. When the violation *is* recognised, seldom is it remedied.

The situation need not continue. This book spells out what can be done when intellectually disabled people are mistreated or exploited.

The book also deals with ways of protecting intellectually disabled people through guardianship, money management and how best to provide for an intellectually disabled person in a will.

It covers the law in New South Wales but will also be relevant to readers in other states.

'This book is doubly welcome — in a straightforward way, it answers all the questions I keep guessing at. And it answers questions I didn't even know I should ask.'

Jeanette Moss
Director, NSW Council for Intellectual Disability

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